RECENT CHANGES TO ENDANGERED SPECIES CRITICAL HABITAT DESIGNATION AND IMPLEMENTATION

OVERSIGHT HEARING

BEFORE THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

Tuesday, April 19, 2016

Serial No. 114–37

Printed for the use of the Committee on Natural Resources

Available via the World Wide Web: http://www.fdsys.gov
or
Committee address: http://naturalresources.house.gov

U.S. GOVERNMENT PUBLISHING OFFICE

99–891 PDF WASHINGTON : 2016

For sale by the Superintendent of Documents, U.S. Government Publishing Office
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OVERSIGHT HEARING ON RECENT CHANGES TO ENDANGERED SPECIES CRITICAL HABITAT DESIGNATION AND IMPLEMENTATION

Tuesday, April 19, 2016
U.S. House of Representatives
Committee on Natural Resources
Washington, DC

The committee met, pursuant to notice, at 10:10 a.m., in room 1324, Longworth House Office Building, Hon. Rob Bishop [Chairman of the Committee] presiding.

Present: Representatives Bishop, Gohmert, McClintock, Thompson, Lummis, Benishek, Gosar, Labrador, LaMalfa, Westerman, Newhouse, Zinke, Hice, Mooney, Hardy, LaHood; Grijalva, Bordallo, Costa, Tsongas, Huffman, Lowenthal, Torres, Dingell, Gallego, Capps, Polis, and Clay.

The CHAIRMAN. The Committee on Natural Resources will come to order. We are happy to have you all here today. We are going to hear testimony on recent changes in critical habitat designation and implementation.

So, under Committee Rule 4(f), any oral opening statements at this hearing are limited to the Chair, the Ranking Member, the Vice Chair, and a designee of the Ranking Member. I ask unanimous consent, as we always do, that other Members' opening statements will be made part of the hearing record if they are submitted to the Committee Clerk by 5:00 p.m. today.

[No response.]

The CHAIRMAN. Hearing no objections, as usual, so ordered.

I also politely ask that anyone in this hearing room please silence your cell phones. This will allow for minimum distraction for both our Members and our guests, and ensure that our semi-permanent, temporary microphone system will actually work.

With that, I am going to recognize myself for the first opening statement before turning it over to Mr. Grijalva. I do appreciate all of you.

STATEMENT OF THE HON. ROB BISHOP, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

The CHAIRMAN. I want to thank the witnesses here who are traveling today for their willingness to provide testimony on this important topic and to seek improvements and implementations of the laws. Hopefully, some day we are going to have agencies that won't require you to make these long trips back here to talk about these kinds of rule changes.

Today's hearing is going to focus on the Obama administration and the Endangered Species Act, and, specifically, some sweeping new rules that were suddenly finalized in February that relate to critical habitat designation. These rules will now make it even easier for the Federal Government to absorb larger and larger swaths

of land and water from Federal agencies, local and state governments, and private citizens, calling them "critical habitat." At the same time, this will give them complete and unprecedented discretion in determining whether activities in these areas adversely modify that particular habitat.

As a result, there are going to be a host of activities that will be potentially delayed or blocked on the whim of elected bureaucrats. And it is going to hurt people. And unfortunately, those people who will be hurt have almost no recourse toward this particular situation.

The sweeping impact of these rules seems to be magnified, especially when you consider recent regulatory actions like EPA's water grab, that was dubiously called the Waters of the U.S. Rule, and other land management directives that expand the Federal policy and authority. They are sad, but they simply do not help the situation.

I am also concerned about the legal contortions this Administration is making to claim authority for these rules in the first place, from the statutory language. For example, they are saying the word "considerable" in the statute. Now, to a normal human being, you would consider "considerable" to mean substantial, a large amount. To the agency, "considerable" is now defined as anything worthy of consideration. That is unrealistic.

The Service is essentially granting to themselves the authority to designate any area that may someday in the future become suitable for a species, even in places where there is absolutely no evidence currently that these species have existed there, or existed at all, or for years in the past. In the future, I expect the agencies to ask Appropriations for tarot cards and Ouija boards so they can do the work under this new expanded rule.

The rule defies Congress' clear intent, and allows the agencies almost limitless discretion. In short, by claiming habitat that may be important in the future in certain areas, they are rendering the term "critical" in "critical habitat" as basically meaningless. This is not what Congress intended several decades ago when they initially drafted the Act.

In addition, changing provisions in the law by the executive branch, as these rules do, will undoubtedly promote more lawsuits and expand careers of lawyers who make a living suing and settling with the Federal Government, yet do absolutely nothing to enhance the benefit of the species they are intended to protect.

There is a better way of making these policy changes. If something is really that significant, the law needs to be amended or clarified. Bring it to Congress and go through the legal process so we can debate this in open public, so we can talk about it and then pass something that is decent and real. What we are doing now is not. We have a poor track record, and this is exacerbating that history of poor track records.

[The prepared statement of Chairman Bishop follows:]

PREPARED STATEMENT OF THE HON. ROB BISHOP, CHAIRMAN, COMMITTEE ON NATURAL RESOURCES

Today's hearing focuses on the Obama administration's implementation of the Endangered Species Act, and specifically, sweeping new rules and a new policy finalized in February by the U.S. Fish and Wildlife Service and National Oceanic and

Atmospheric Administration relating to critical habitat designations and the standard to determine if critical habitat is adversely modified.

Over the past few years, this Administration has already designated millions of acres and thousands of river miles as critical habitat under the ESA. These rules will now make it even easier for the Federal Government to designate larger and larger swaths of local, state, Federal and private land and waters as critical habitat, while, at the same time, give them complete discretion to determine whether activities in these areas "adversely modify" the habitat. As a result, a host of economic and energy-related activities will potentially be delayed or blocked at the whim of unelected bureaucrats.

Currently, the ESA consultation process is lengthy, expensive and uncertain for projects that must navigate through it. Just the threat of having to consult with either the Fish and Wildlife Service or NOAA is enough to cloud completion of and discourage investment in job-producing projects. Yet, the process yields almost no tangible benefit to species.

In addition to the sweeping impact of these rules, the impact is greatly magnified when considered in light of other recent regulatory actions, such as the EPA's water-grab regulation dubbed the "Waters of the U.S." rule and other land management directives that expand Federal permitting and regulatory authority.

Beyond any concerns about the significant substantive policy impacts of these rules, I am also deeply concerned about the legal contortions the Administration makes to claim the authority for these rules from the statutory language in the first place.

As an example, the Fish and Wildlife Service and NOAA define the word "considerable" to mean "anything that is worthy of consideration," rather than "large in amount" or "substantial," as any average person would. The Services have essentially granted to themselves authority to designate areas that *may*, someday in the future, become suitable for a species—even in places where there is no evidence of the presence of a species for years, if at all.

These rules defy Congress' clear intent to place restrictions on the Federal Government's designation of critical habitat, instead allowing the Federal agencies nearly limitless discretion. In short, by claiming habitat may be important in the future, they render the term "critical" in "critical habitat" as meaningless. This is *not* what Congress intended when these terms were passed and enacted into law several decades ago.

In addition, changing provisions of the law by executive branch regulation as these rules do will undoubtedly promote more ESA lawsuits and careers for lawyers making a living suing and settling with the Federal Government, yet do little to benefit, (and probably harm), the species they're intended to protect.

There is a better way to make sweeping policy changes. If something is important enough that the law needs to be amended or clarified, it should be brought to Congress and representatives of people to actually debate and vote on these policies before enactment—not lawyers and bureaucrats that have a poor track record in recovering species and a worse one in being responsive to the people.

I want to thank our witnesses for traveling to be here today and for their willingness to provide testimony on this important issue and to seek improvements to the implementation of laws that have gone far afield of their original intent.

The CHAIRMAN. With that, I will yield back the remainder of my time and recognize Mr. Grijalva for his opening statement.

STATEMENT OF THE HON. RAÚL M. GRIJALVA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. GRIJALVA. Thank you, Mr. Chairman. I wish today's hearing was going to be a thoughtful discussion about the importance of habitat and protecting and recovering imperiled American fish and wildlife. That discussion needs to take place. Because, even though the Endangered Species Act has proven more than 99 percent effective in preventing extinction, a lack of suitable habitats has severely limited many species' prospects for recovery.

We have plowed or paved 99 percent of our tallgrass prairies, cut down 95 percent of our old-growth forest, and filled in more than

half of our wetlands in the lower 48 states. That more species have not gone extinct in the last 40 years is a testament to how effective the ESA really is.

We should be talking about how to secure more habitat and protect ecosystems needed for populations of threatened and endangered fish and wildlife to first recover and then be delisted.

In my personal experience in Pima County, when I was a county supervisor there, before ascending to this exhilarating position as a Member of Congress, in response to an endangered species, the pigmy owl, we developed a critical habitat plan. In doing so, the cries of economic Armageddon were loud. The lawsuits were plentiful. And in the end, the voters in two elections voted bonds for land acquisition and for habitat protection. And the only thing that really slowed down development, almost to a halt, in Pima County in southern Arizona was the bursting of the housing bubble, which in that whole recession we brought development in the area to almost a complete halt.

The people responsible for that particular economic downturn and the bubble bursting on housing are not listed as endangered. It is the opposite, they are listed as quite robust and continuing business as usual.

So, unfortunately, today we are not going to have a conversation about critical habitat in a reasonable discussion. The Majority and their witnesses will use this hearing as yet another opportunity to attack President Obama.

At this point, President Obama cannot eat a sandwich without being accused of gross executive over-reach and illegal infringement on congressional authority. My Republican colleagues, the same ones who say they love the Constitution, do not even believe the President should be able to exercise authorities clearly listed in the document, such as the authority to fill vacancies in the Supreme Court.

But reaching down into these obscure and largely inconsequential ESA rules to find abuses of power is a serious stretch, even for them. Critical habitat designations under ESA do not prevent development, period. They do not prevent development on public lands, and they do not prevent development on private lands. This is true, whether or not consultation is required, because of a federally permitted action in critical habitat, or whether or not one of the Services determines that critical habitat would be destroyed or adversely modified as a result of such an activity.

The most, I repeat, the most the law allows is a consideration of reasonable and prudent alternatives that would allow the project to move forward without harming the habitat necessary for species survival. Over the past 8 years, the Fish and Wildlife Service conducted 90,000 ESA Section 7 consultations, exactly zero of which found that a project would result in adverse modification of critical habitat.

Despite what you will hear today from the Majority, these rules will not change that. They will also not change the fact that if you are conducting an activity on private property, and no Federal permit is required, then critical habitats will not impact you in any way.

Even though it is a very weak regulatory tool, critical habitat designation does benefit species by helping Federal and state managers plan for conservation, and ensuring that activities carried out or permitted by Federal agencies at least consider the potential impacts to biodiversity.

It is perfectly appropriate and, in fact, necessary for the maintenance of our republic that our laws protect the interests of all Americans in conserving the lands and wildlife we all own together as citizens and taxpayers.

With that in mind, I look forward to and welcome our witnesses today to the hearing, and I yield back, Mr. Chairman.

[The prepared statement of Mr. Grijalva follows:]

PREPARED STATEMENT OF THE HON. RAÚL GRIJALVA, RANKING MEMBER, COMMITTEE ON NATURAL RESOURCES

Thank you, Mr. Chairman.

I wish today's hearing was going to be a thoughtful discussion about the importance of habitat in protecting and recovering imperiled American fish and wildlife. That discussion needs to take place, because even though the Endangered Species Act has proven more than 99 percent effective in preventing extinction, a lack of suitable habitat has severely limited many species' prospects for recovery.

We have plowed or paved 99 percent of our tallgrass prairies, cut down 95 percent of our old growth forests, and filled in more than half of our wetlands in the lower 48 states. That more species have not gone extinct in the last 40 years is a testament to how effective the ESA really is. We should be talking about how to secure more habitat and protect the ecosystems needed for populations of threatened and endangered fish and wildlife to first recover, and then be delisted.

Sadly, that is not the conversation we will have today. Instead, the Majority and their witnesses will use this hearing as yet another opportunity to attack President Obama. At this point the President can't eat a sandwich without being accused of gross executive over-reach and illegal infringement on congressional authority.

Congressional Republicans—the same ones who say they love the Constitution—do not even believe the President should be able to exercise authorities clearly listed in that document, such as the authority to fill vacancies on the Supreme Court.

But reaching down into these obscure and largely inconsequential ESA rules to find abuses of power is a serious stretch, even for them.

Critical habitat designations under the ESA do not prevent development, period. They do not prevent development on public lands, and they do not prevent development on private lands.

That is true whether or not consultation is required because of a federally permitted action in critical habitat, and whether or not one of the Services determines that critical habitat would be destroyed or adversely modified as a result of the activity.

The most—I repeat—the most that the law allows is the consideration of reasonable and prudent alternatives that would allow the project to move forward without harming the habitat necessary for species survival.

Over the past 8 years, the Fish and Wildlife Service conducted nearly 90,000 ESA Section 7 consultations, exactly zero of which found that a project would result in adverse modification of critical habitat. Despite what you will hear today from the Majority, these rules will not change that. They will also not change the fact that if you are conducting an activity on private property and no Federal permit is required, then critical habitat will not impact you in any way.

Even though it is a very weak regulatory tool, critical habitat designation does benefit species by helping Federal and state managers plan for conservation, and ensuring that activities carried out or permitted by Federal agencies at least consider the potential impacts to biodiversity.

It is perfectly appropriate, and in fact necessary for the maintenance of our republic, that our laws protect the interest of all Americans in conserving the lands and wildlife we all own together as citizens and taxpayers.

With that in mind, I look forward to hearing from our witnesses today and I yield back.

The CHAIRMAN. Thank you.

I now recognize the Vice Chairman, Mrs. Lummis, for her opening statement.

STATEMENT OF THE HON. CYNTHIA M. LUMMIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WYOMING

Mrs. LUMMIS. Thank you, Mr. Chairman. You know, this committee must look at the Administration's actions on critical habitat designations because they expand the scope of the Endangered Species Act.

The U.S. Fish and Wildlife Service and NOAA Fisheries recently amended four regulations and two new policies regarding critical habitat under the Endangered Species Act. The Services are unilaterally promulgating rules that change and expand critical habitat designations without congressional input.

While there is a need for improvement and modernization of the ESA for the sake of species recovery, these new rules could alter activities in areas newly proposed or already designated as critical habitat. This could be in areas where species simply have the potential for using the habitat, even if historically a species has not used that habitat before.

Bottom line, these policies will require more Federal permitting that is already bogged down in bureaucratic processes. In addition, while the Services have analyzed these regulations in accordance with the criteria of the National Environmental Policy Act individually, the cumulative impact has not been analyzed. The aggregate result is broad-sweeping changes with minimal input from the American public.

The regulations will also likely encourage increased ESA litigation and closed-door ESA settlements between the Services and litigious groups. The Services find that they are forced into actions from serial litigators and the courts. Decisions about wildlife management are now made most often behind closed courtroom doors, not out in the open with the very people who live on and love the land and the wildlife.

That is why it is so important that we get it right when it comes to making listing decisions and when rules such as this are amended. We need sound science and open data that can be replicated. We need innovative, collaborative approaches to wildlife management that offer incentives for sound management.

We need a clear distinction in our minds about what constitutes conservation: on-the-ground stewardship or repeated court battles. Court battles slow down the ability to recover species and steal money from recovery. We need a common understanding of what constitutes success when it comes to the ESA.

In short, we need a new 21st century conservation ethic that is consistent with the movement that the American people have made in their understanding of sound and replicatable science and boots-on-the-ground conservation, that conserves species and saves habitat—the people who actually implement it on the ground, not the bureaucrats in Washington, and not the litigants in the courtrooms, many of whom have never been on the habitat that they are challenging.

We need a 21st century conservation ethic that is not clouded by accusations and rancor. We can and should do better for our wildlife. To that end, I hope the Services are willing to engage lawmakers in a productive dialogue to improve the ESA.

Thank you, Mr. Chairman. I yield back.

[The prepared statement of Mrs. Lummis follows:]

PREPARED STATEMENT OF THE HON. CYNTHIA M. LUMMIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WYOMING

Thank you Mr. Chairman.

I'm pleased the committee is looking today at the Administration's actions on critical habitat designations that I feel expands the scope of the Endangered Species Act (ESA).

The U.S. Fish and Wildlife Service and NOAA Fisheries (the Services) recently amended four regulations and two new policies regarding critical habitat under the Endangered Species Act.

Instead of welcoming congressional input, the Services are unilaterally promulgating rules that completely change and expand critical habitat designations.

While there is a need for improvement and modernization of the ESA for the sake of species recovery, these new rules could significantly alter activities in areas newly proposed or already designated as critical habitat. This could be in areas where species simply have the potential for using the habitat, even if historically a species has not used that habitat before.

Bottom line, these sweeping policies will require more Federal permitting that is already bogged down in bureaucratic processes.

In addition, while the Services have analyzed these regulations in accordance with the criteria of the National Environmental Policy Act (NEPA) individually, the cumulative impact has not been analyzed. The aggregate result is broad-sweeping changes with minimal input from the American public.

The regulations will also likely encourage increased ESA litigation and closed-door ESA settlements between the Services and litigious groups.

The Services find that they are forced into actions from serial litigators and the courts. Decisions about wildlife management are now made most often behind closed courtroom doors, not out in the open with the very people who live on and love the land and the wildlife.

That is why it is so important that we get it right when it comes to making listing decisions. We need sound science, and open data that can be replicated. We need innovative, collaborative approaches to wildlife management that offer incentives for sound management.

We need a clear distinction in our minds about what constitutes conservation: on the ground stewardship, or repeated court battles. We need a common understanding of what constitutes success when it comes to the ESA.

In short, we need a new 21st century conservation ethic that is not clouded by accusations and rancor. We can and should do better for our wildlife.

To that end, I hope that the Service is willing to engage lawmakers in a productive dialogue to improve the ESA. Thank you and I yield back.

The CHAIRMAN. Thank you. Now, at the request of the Ranking Member, I recognize for an opening statement Mr. Huffman for 30 seconds.

Mr. HUFFMAN. Thirty seconds?

The CHAIRMAN. No, I am kidding, you have 5 minutes.

[Laughter.]

Mr. HUFFMAN. I won't take it all.

STATEMENT OF THE HON. JARED HUFFMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. HUFFMAN. Thank you, Mr. Chair, and thank you to our Ranking Member for allowing me to pinch hit for Vice Ranking Member, Mr. Sablan. I always appreciate the chance to have a

policy discussion about the Endangered Species Act, and I want to thank you for holding this hearing.

To start I want to make something very clear, and that is that the ESA offers critical protections for all types of species, not just the charismatic ones, not just the cuddly megafauna, not just the ones that are beloved by sportsmen. The keystone species that are protected under the ESA play a vital role in the maintenance of healthy ecosystems, even when they do not look cute.

Now, the conservation of endangered and threatened species relies strongly on the vital designation and protection of their critical habitats under the ESA. Today I am sure that we are going to hear the usual myths about the threat that critical habitat designation creates for landowners and developers.

And I am sure that my colleagues on the other side of the aisle will use folksy anecdotes to mock the Fish and Wildlife Service in carrying out the work of wildlife conservation. And it would not be a hearing on the ESA if we did not have calls for reform of the ESA, combined with half-baked promises that somehow the authors, in their hearts, would never dream of undermining the work of protecting species.

Just last week marked the 100th legislative proposal to undermine the Endangered Species Act, which means the assault on the environment and endangered species by this Congress is truly unprecedented. But the truth is, these reassurances, like the myths perpetuated by the Majority, are false; and we have really seen everything in our discussions on these issues, from legislative proposals to toxic amendments, dangerous policy riders, waivers of the ESA for fast-track projects like the Keystone XL Pipeline. We have seen it all.

And the legislative proposal that was lucky enough to be number 100 was the energy and water appropriations bill in the House, which included controversial language from Congressman Valadao's annual water legislation that would undermine California state water laws, repeal ongoing conservation efforts to restore rivers, throw out biological opinions protecting critical fisheries, and devastate delta and coastal communities, where clean water and healthy fisheries means jobs.

Let's not kid ourselves. We know why this is being proposed, and it is for the very same reason that the Majority is holding this hearing today and has held so many hearings just like it before. The goal is not to fix the ESA or to reform or modernize it, or to somehow do a better job recovering species. Congressman Valadao, the author of that anti-ESA provision in the energy and water appropriations bill was very candid when asked about his goal. He said it was part of a process that would "hopefully someday repeal" the Endangered Species Act.

I give Congressman Valadao credit for at least being honest about his intentions. But when my colleagues across the aisle continuously push to gut the Endangered Species Act, I will continue to defend it. The protection of biodiversity is worth defending. Without diversity, ecosystems that provide crucial services cannot function properly. That includes animals and plants that simply cannot withstand the onslaught of development, and cannot compete with the industrial forces that our society brings to bear.

And critical habitat designations are undoubtedly one of the most important tools in the toolbox for conservation of endangered species. Rather than serving as an assault on private property rights, as my colleagues continuously characterize it, critical habitat designations serve as enabling indicators for land and resource users. Without those designations, recovery will be prolonged, it will be more expensive, and it will be less successful in the long run.

So, I ask that all Members here today stand up to protect our threatened and endangered species.

I thank you, Mr. Chair, and I yield back the balance of my time.

Mrs. LUMMIS [presiding]. Are there any other opening statements?

[No response.]

Mrs. LUMMIS. Thank you. I will now introduce our witnesses.

First of all, Mr. Dan Ashe is the Director of the U.S. Fish and Wildlife Service. Welcome, and thank you for being available to this committee. You have been really helpful to this committee about being here, so we appreciate that very much.

I also want to welcome Mr. David Bernhardt. He is an attorney with the law offices of Brownstein Hyatt Farber Schreck, where he is Co-Chairman of the Natural Resources Department. He was formerly the Solicitor for the U.S. Department of the Interior. Welcome, Mr. Bernhardt.

Dr. Loyal Mehrhoff—did I pronounce that correctly—is the Endangered Species Recovery Director at the Center for Biological Diversity. Welcome.

Ms. Robbie LeValley is the County Administrator for Delta County in Colorado. She was formerly the President of the Colorado Cattlemen's Association. We welcome you, as well.

And finally, Ms. Karen Budd-Falen is a senior partner with Budd-Falen Law Offices in Cheyenne, Wyoming, and a long-time friend, I might add. So welcome, Ms. Budd-Falen.

I would like to remind our witnesses that under our Committee Rules, oral statements must be limited to 5 minutes, but your entire written statement will appear in the hearing record.

When you begin the lights on the witness table will turn green. When you have 1 minute remaining, the yellow light comes on; and your time will have expired when the red light comes on. I will ask you to swiftly conclude your statement when the red light comes on.

Now an old hand to this committee, the Chair recognizes Director Ashe for his testimony.

STATEMENT OF DAN ASHE, DIRECTOR, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

Mr. ASHE. Thank you very much, Mrs. Lummis, Mr. Grijalva, and members of the committee. It is a great honor to be with you here today. Looking back in history, in 1972, the 92nd Congress of the United States and President Richard M. Nixon gave our Nation a great gift, a visionary and a powerful law with the goal of preventing species extinction. It has been remarkably successful when you think that between 1972 and today the United States population has increased by about 65 percent, from 210 million people

to 323 million people; the gross domestic product of our Nation has increased 314 percent in real terms, from a $5.25 trillion to $16.5 trillion economy; and the individual per capita GDP in our country has increased from $24,000 to $51,000.

So, our country has prospered and individual Americans have prospered during this time. We have managed to preserve our biological diversity through, in large part, the work and the working of this great law. In this Administration, we have built upon the past success of this law. We have delisted more species due to recovery than any prior administration, including the Louisiana Black Bear, the Oregon chub, the first fish ever delisted due to recovery, the Delmarva fox squirrel, the Virginia northern flying squirrel, the Modoc sucker, the brown pelican, and many others will follow.

By the time this Administration is done, we will have delisted, due to recovery, more species than all previous administrations combined. We have also forged an innovative and epic partnership to conserve imperiled species before listing is required. Recent examples are Montana's Arctic grayling, the Sonoran Desert tortoise in Arizona, the New England cottontail, and the greater sage-grouse.

I think two major things have enabled this, although many have contributed: the multi-district litigation settlement that got us out of court and on to a sensible schedule that allowed partnerships to form and grow; and a powerful and progressive partnership with the Natural Resources Conservation Service in the Department of Agriculture, which has incentivized voluntary conservation on working landscapes.

The changes that we are going to talk about today in our rules and underlying the Endangered Species Act remind me of a quote from Voltaire, that common sense is not so common. So I am not going to claim that mantle in speaking about our work; but I am going to say that we have focused on making sensible and intelligent choices that are improving our administration of the law, making it more predictable, more transparent, more scientific, more supportive of partnership, and more conducive to long-term strategic thinking about recovery of species.

Good government and sensible policy does not attract a lot of paying clients. It does not generate a lot in direct mail contributions, or even foundation funding. So I imagine you are going to hear a lot today predicting dire economic devastation or maybe even species extinction because of some of the changes that we have made to the regulations underlying the law. But I think the record is clear: the law works; we are making it work better.

Earlier this year, or last year, when we announced our decision that we did not need to list the greater sage-grouse, Rancher Duane Coombs from Nevada stood up and said, "This is good government." Earlier in the year, Rancher Tom Strong in Hardy County, Oregon stood up and said, "What is good for the bird is good for the herd." These are reflective of the kind of work that is going on today to conserve species, and it is representative of the kind of work that will go on as we implement the changes in the law that we are going to talk about today. Thank you very much.

[The prepared statement of Dan Ashe follows:]

PREPARED STATEMENT OF DAN ASHE, DIRECTOR, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR

INTRODUCTION

Good morning Chairman Bishop, Ranking Member Grijalva, and members of the committee. I appreciate the opportunity to testify before you today on the Endangered Species Act of 1973 (ESA). At the committee's request, my testimony will focus on the U.S. Fish and Wildlife Service's (FWS) implementation of Congress' mandate under the ESA to designate critical habitat for threatened and endangered species.

The ESA is one of the Nation's most important conservation laws. It is implemented jointly by FWS and the National Marine Fisheries Service (NMFS), collectively referred to as the Services. The law's stated purpose includes the conservation of threatened and endangered species and the ecosystems upon which they depend. The ESA provides a safety net for species that are at risk of going extinct. When a species is designated as threatened or endangered—or "listed" under the ESA—it is in dire need of help. FWS uses the best available scientific and commercial information to determine whether species need to be listed, to identify and address the reasons that listed species are at risk of going extinct, and to facilitate the recovery of the species.

The ESA has been successful in its essential goal to conserve listed species, which effectively protects the Nation's biological diversity heritage for the benefit of future generations of Americans. Since it was enacted by Congress in 1973, the ESA has successfully prevented the extinction of more than 99 percent of the over 1,500 domestic species that have been protected through the Act.

The continued success of the ESA is predicated upon FWS's partnerships with states, other Federal agencies and private landowners, as demonstrated by several conservation achievements that recently culminated in "delisting" several recovered species. Recovering species to the point where they no longer need the protections of the ESA often requires focused efforts over many years to implement recovery actions that include, for example, habitat restoration, best management practices for various human activities, and consistent monitoring. Partnerships developed and maintained by FWS have sustained years of recovery efforts for a myriad of species. As a result, during the Obama administration, FWS has delisted more species due to recovery than during any prior administration. Recently delisted species include the Louisiana black bear, Oregon chub, Delmarva fox squirrel, Virginia northern flying squirrel, Modoc sucker, and brown pelican.

Partnerships have similarly been essential to conserving species that are candidates for listing to the point where those species don't need the protection of the ESA. Recent examples include the Sonoran desert tortoise in Arizona, the New England cottontail in six northeastern states, and the greater sage grouse in 11 western states. Ensuring the conservation of these species and the ecosystems upon which they depend is good for a myriad of other wildlife species and for humans who use the same ecosystems for hunting, fishing, outdoor recreation, and other services like clean air and water. These conservation success stories are also a measure of the success and importance of the ESA.

CRITICAL HABITAT

Part of the ESA's program for conserving listed species includes designating "critical habitat." When FWS proposes an animal or plant for listing, Section 4 of the ESA also requires FWS to designate critical habitat for the species. FWS proposes critical habitat designations based on the best available scientific and commercial information on what an animal or plant species needs to survive, reproduce, and recover. The ESA also directs the FWS to evaluate the anticipated economic impacts of the proposed critical habitat designation. FWS makes both the proposed designation and economic analysis available for public review and comment. The proposed designation is also submitted to independent peer review. It is only after this public comment period, peer review, and consideration of the impacts of the designation and potential exclusion of specific areas that the FWS makes a final designation of critical habitat.

Section 3(5)(A) of the ESA defines critical habitat in two parts:

(i) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of the Act, on which are found those physical or biological features (1) essential to the conservation of the species and (2) which may require special management considerations or protection; and,

(ii) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species.

Critical habitat designations do not affect land ownership or impose liens on property. Designating critical habitat does not allow the government to take or manage private property, nor does it establish a refuge, reserve, preserve, or other conservation area. Designation also does not authorize, in any way, government or public access to private land.

The only effect of designating an area as critical habitat is to trigger the ESA requirement that actions authorized, funded, or carried out by Federal agencies must not destroy or adversely modify designated critical habitat. FWS assists Federal agencies in meeting this responsibility by consulting with them pursuant to section 7 of the ESA when their actions may affect designated critical habitat.

As I testified in September 2015, FWS is continuing to take steps to improve the implementation of the ESA. We are committed to making the ESA work for the American people to accomplish its purpose of conserving threatened and endangered species and protecting the ecosystems upon which they depend. Our efforts to make the ESA work better are consistent with President Obama's Executive Order 13563, Improving Regulation and Regulatory Review, and are outlined in the Department of Interior's Preliminary Plan for Retrospective Regulatory Review.

As part of the Administration's ongoing efforts, the Services finalized a policy and two rules in February of this year that will provide a clearer, more consistent and predictable process for designating critical habitat. One rule clarifies the procedures and standards used for designating critical habitat. The new policy is intended to provide greater predictability, transparency, and consistency regarding how the Services consider exclusion of areas from critical habitat designations. The other rule revises the definition of "destruction or adverse modification." These three components are discussed in greater detail below.

DESIGNATING CRITICAL HABITAT RULE—PART 424

Under the ESA, Congress requires the Services to designate critical habitat for listed species to the maximum extent "prudent and determinable." The ESA sets forth the general framework for designating critical habitat, and the Services have regulations in 50 CFR part 424 that further set out standards and processes for designation of critical habitat. However, there had been no comprehensive revisions to the ESA implementing regulations since 1984. In the years since those last revisions, we have gained considerable experience in implementing the critical habitat requirements of the ESA, and there have been numerous court decisions regarding the designation of critical habitat that have further informed the designation process. For the benefit of the public, and as a basic matter of good government, we used this substantial body of experience to finalize a rule in February 2016 that updates and clarifies the procedures, standards, and criteria used for designating critical habitat.

In addition to a number of minor and technical changes, this rule includes a definition for "geographical area occupied by the species," which was previously undefined. Of note, this definition recognizes the importance of areas used throughout all or part of the species' life cycle, often referred to as the "range" of the species, and can include important areas such as migratory corridors, seasonal habitats, and habitats used periodically.

The rule also revises the Services' regulations to be consistent with the 2004 National Defense Authorization Act (NDAA) that make certain lands managed by the Department of Defense ineligible for designation as critical habitat. In order to be exempted from a designation of critical habitat, lands must be covered by an integrated natural resources management plan (INRMP) under the Sikes Act, with a determination made by the Secretary of the Interior or the Secretary of Commerce that the plan provides a conservation benefit to the species.

As mentioned above, the second part of the statutory definition of critical habitat provides that areas outside the geographical area occupied by the species at the time of listing, i.e., unoccupied areas, should be designated as critical habitat if they are determined to be "essential for the conservation of the species." Our previous regulations specified that the Services should only designate unoccupied areas when the designation of occupied areas would be inadequate to ensure the conservation of the species. Based on years of applying the previous regulations, the Services concluded that this rigid step-wise approach is both unnecessary and unintentionally limiting. It does not necessarily serve the best conservation strategy for the species and, in some circumstances, may result in a designation that is geographically larger but less effective as a conservation tool.

This rule allows us to consider including occupied and unoccupied areas at the same time during a critical habitat designation, based on any conservation strategy, criteria, or plan for the species that may be developed. This improved ability to designate unoccupied areas will help us make more effective and defensible designations for species dependent upon highly dynamic and short-lived habitats, such as sandbars and early successional habitats, and will be increasingly important as the effects of global climate change continue to drive rapid change in the environment.

The concurrent evaluation of occupied and unoccupied areas for a critical habitat designation, using the best available science and reliable predictions, will allow us to develop more precise designations that can serve as more effective conservation tools, focusing conservation resources where needed and minimizing any regulatory burdens that are not needed.

CRITICAL HABITAT EXCLUSIONS POLICY—SECTION 4(B)(2)

Under section 4(b)(2) of the ESA, Congress provided discretionary authority to the Secretary to exclude any specific area from a critical habitat designation if the benefits of such exclusion outweigh the benefits of designation, so long as the exclusion will not result in the extinction of the species.

Over the years, much attention has been focused on the process by which the Services consider critical habitat exclusions. In February of 2016, we finalized a policy to provide greater predictability and transparency regarding our process and methods. This policy covers several fact patterns that frequently arise in the context of exclusions. It establishes that we will exercise our authority to exclude specific areas in a way that encourages voluntary conservation efforts on non-Federal lands; and it focuses designations on Federal lands because that is where a critical habitat designation is most likely to make a difference for conservation of the species.

The policy clarifies how we evaluate the benefits that conservation plans and partnerships on private lands provide to species as we analyze potential critical habitat exclusions. These considerations can include private conservation plans, agreements, and partnerships that do not involve the Services, as well as those developed under section 10 of the ESA, including Habitat Conservation Plans (HCPs), Candidate Conservation Agreements with Assurances (CCAAs), and Safe Harbor Agreements (SHAs).

We recognize the strong conservation benefit for listed species that can be provided by efforts of private landowners. These benefits often cannot be achieved through the designation of critical habitat, and a critical habitat designation generally has little effect on private lands. As such, we generally give great weight to the benefits of excluding areas where there have been demonstrated partnerships. We anticipate consistently excluding from critical habitat designations areas that are covered by properly implemented conservation plans.

This policy clarifies how the Services will address Tribal lands when designating critical habitat. Following the direction of Secretarial Order 3206 regarding tribal rights and Federal-Tribal trust responsibilities, when we undertake a critical habitat exclusion analysis, we will always consider exclusions of Tribal lands prior to finalizing a designation of critical habitat, and will give great weight to Tribal concerns in analyzing the benefits of exclusion.

The new policy also clarifies that in addition to the exemption of DOD lands with completed INRMPs (as explained above), the Services will always consider excluding areas based on likely impacts to national security or homeland security, when those exclusions are requested and justified by DOD, Department of Homeland Security (DHS), or another Federal agency.

FWS recognizes Congress' intent to focus on Federal agencies in ESA implementation. Accordingly, under the policy, Federal lands are prioritized as sources of support in the recovery of listed species. To the extent possible, the Services will focus designation of critical habitat on Federal lands in an effort to avoid any possible regulatory burdens related to critical habitat on non-Federal lands. As such, we will focus our critical habitat exclusions on non-Federal lands.

ADVERSE MODIFICATION RULE

Section 7 of the ESA requires Federal agencies to ensure that their actions are not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of designated critical habitat of such species.

The ESA does not define "destruction or adverse modification." The Services promulgated regulations in 1986 to clarify this statutory requirement. After two circuit court decisions invalidated the regulatory definition of "destruction or adverse modification" in 2001 and 2004, the Services issued guidance instructing biologists to no

longer rely on the regulatory definition. The guidance, issued in 2004 by FWS and in 2005 by NMFS, provides an analytical framework for making destruction or adverse modification determinations.

The final rule issued in February 2016 provides a new regulatory definition of "destruction or adverse modification" of critical habitat. This new definition does not change how the Services conduct consultations to assess destruction or adverse modification of critical habitat. Instead, the definition is consistent with our approach for the past decade. The rule codifies the principles of the 2004/2005 guidance, and takes into consideration public comments, ccongressional intent, relevant case law, and the Services' collective experience in applying the "destruction or adverse modification" standard over the last three decades. The definition continues the intent of the 2004/2005 guidance to evaluate the effects of a Federal action on the recovery, not just the survival, of listed species. Under the new definition, FWS will maintain our approach to assessing the effects of an action on critical habitat by evaluating the impacts to certain physical and biological features. Specifically, we will continue to consider alterations to physical and biological features that are necessary for the recovery of the species as "effects" to the critical habitat. We will also continue to consider as "effects" those alterations to critical habitat that prevent or delay the development of those physical and biological features, which may or may not be present, or which may be present only in sub-optimal quantity or quality, at the time of critical habitat designation.

For the past 10 years, the Services have followed this approach to consulting on the effects of Federal actions on designated critical habitat. As such, we do not expect this final rule to alter the section 7 consultation process from our current practice, and previously completed biological opinions do not need to be re-evaluated.

This rulemaking will improve the predictability and transparency of these determinations for Federal agencies and the public.

CONCLUSION

In conclusion, these two final rules and policy codify and cohesively present to the public certain aspects of our implementation of the critical habitat mandates in the ESA. They build upon a substantial body of experience and court rulings and have benefited from peer review, and review and comment by the public. They provide a clearer, more consistent, and more predictable process for designating critical habitat for listed species under the ESA.

As the Administration moves forward with efforts to improve the implementation of the ESA, we ask the Congress to join this effort that benefits the public through more effective conservation of listed species and more efficient, transparent, and predictable processes for the regulated public. We note that preventing extinction and facilitating recovery requires people on the ground—"in the field"—to do the science, prevent extinction, foster partnerships, and develop and implement recovery actions. To that end, the most significant step that Congress can take to improve the effectiveness of the ESA is to provide the resources needed to get the job done in the field. We therefore ask that Congress support the President's budget request for endangered species conservation for Fiscal Year 2017.

QUESTIONS SUBMITTED FOR THE RECORD TO DAN ASHE, DIRECTOR, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR

Questions Submitted by Chairman Rob Bishop

Question 1. In the preamble to the final rule, frequent references are made to "range" in discussing critical habitat. Section 3 of the Endangered Species Act defines critical habitat relative to "specific areas" and sets a general prohibition against including an "entire geographical area" in a critical habitat designation (except in those circumstances determined by the Secretary). 16 U.S.C. § 1532(5)(A)(i)–(ii), (5)(C). Would the new rules allow a designation of critical habitat that encompasses the full range of a species, such as widespread avian or bat species, if the entire area is determined to be essential to the species' conservation? If so, how would such a broad designation of critical habitat comport with the statutory limitations in Section 3 of the Act?

Answer. The definition of "critical habitat" in the Act recognizes two types of habitat, distinguished from one another according to whether or not the species was present in the area at the time the species was listed under the Act: (1) specific areas within the geographical area occupied by the species *at the time it is listed* on which are found those physical and biological features essential to the conserva-

tion of the species and which may require special management considerations or protection, (2) specific areas outside the geographical area occupied by the species *at the time it is listed* that are essential for the conservation of the species (emphasis added). The general prohibition of Section 3(5)(C) refers to "the entire geographical area which *can* be occupied" (emphasis added) and clearly applies to a broader area than that occupied at the time a species is listed.

Our revised regulations governing designation of critical habitat at 50 CFR Part 424, like the previous regulations they replace, allow for a critical habitat designation of specific areas that in total encompass most or all the entire geographical area occupied by the species at the time it is listed (i.e., the range). This may be the case for many species that have been reduced to occupying only a small subset of their historical range at the time of listing. Such a designation would be consistent with both the definition in Section 3(5)(A) and the limitation in Section 3(5)(C).

Question 2. Similarly, the final rule mentions migratory corridors, breeding grounds, and foraging grounds. Would the new rules allow for designation of the entire migratory corridor, breeding grounds, and foraging grounds as critical habitat for a bat or avian species, such as the whooping crane, under any circumstance?

Answer. We would limit any designation to those specific areas that satisfy the definition at Section 3(5)(A), as either occupied or unoccupied areas, when designating critical habitat in migratory corridors, breeding grounds, and foraging grounds. We will continue to use the best scientific data available to determine if any such specific areas exist for a species. Each species' life cycle is different and the details of such areas, if they exist, would be explained in the proposed and final rules designating critical habitat for a particular species.

Question 3. In the preamble to the final rule, the Service asserts that it can designate critical habitat in anticipation of changes in habitat use "in response to the effects of climate change." 81 Fed. Reg. at 7,426. For example, the Service states that it "may find that an unoccupied area is currently 'essential for the conservation' even though the functions the habitat is expected to provide may not be used by the species until a point in the foreseeable future." Id. What is the Service's legal authority for this approach to designating critical habitat on the basis of anticipated climate effects? What data would the Service rely upon for purposes of identifying these future effects? How does the Service intend to implement designation of critical habitat in unoccupied areas in advance of climate change in a manner that is not speculative and is not arbitrary or capricious?

Answer. The Act expressly allows for the consideration and inclusion of unoccupied habitat (i.e., "specific areas outside the geographical area occupied by the species at the time it is listed," Section 3(5)(A)(ii) of the Act) in a critical habitat designation if such habitat is determined to be essential for the conservation of the species. We determine whether areas unoccupied at the time of listing are essential for the conservation of the species by considering the best available scientific data regarding the life history, status, and conservation needs of the species. Although an area must be determined essential for the conservation, this could be based on reliable scientific projections of suitability or use of the habitat in the future.

There have been specific circumstances, as discussed in our final rule, where data show or predict a shift in habitat availability or use by a species in response to the effects of climate change. An example would be a landward shift in tidal marsh habitat as a result of predicted sea level rise. In cases where the best scientific data available indicate that specific areas not currently occupied by a species are essential for its recovery because of the functions it is reasonably expected to provide in the future, it is permissible and appropriate to include such specific areas in a designation, provided that the Services can explain why the areas meet the definition of "critical habitat." The data and rationale on which such a designation is based will be clearly articulated in our proposed rule designating critical habitat, which will be available for public comment.

Question 4. How has the Service adequately acknowledged and explained the rules' marked deviation from the Service's longstanding position—that unoccupied habitat should only be designated after occupied habitat is exhausted—such that the agency's change in its interpretation of the ESA would be afforded deference by the courts? Where does the Service find such authority in the ESA or in legislative history?

Answer. Section 3(5)(A)(ii) of the ESA expressly allows for the consideration and inclusion of unoccupied habitat in a critical habitat designation if such habitat is determined to be essential for the conservation of the species. This rule does not expand Service's authority or discretion. Rather, it clarifies the existing process by

which we designate critical habitat based on lessons learned over many years of implementing critical habitat and case law. The prior regulation in section 424.12(e) provided that the Secretary shall designate areas outside the "geographical area presently occupied by a species" only when "a designation limited to its present range would be inadequate to ensure the conservation of the species." Although this provision represented one reasonable approach to giving meaning to the term "essential" as it relates to unoccupied areas, the Services have found,, that this provision is both unnecessary and unintentionally limiting. While Congress supplied two different standards to govern the Secretary's designation of these two types of habitat, there is no suggestion in the legislative history that the Services were expected to exhaust occupied habitat before considering whether any unoccupied area may be essential. In addition, although section 3(5)(C) of the Act reflects congressional intent that a designation generally should not include every area that the species can occupy, this does not translate into a mandate to avoid designation of any unoccupied areas unless relying on occupied areas alone would be insufficient. Indeed, there may be instances in which particular unoccupied habitat is more important to the conservation of the species than some occupied habitat. The Services have thus used their discretion to update the regulations and have explained the basis for their interpretation.

We expect that the concurrent evaluation of occupied and unoccupied areas for a critical habitat designation will allow us to develop more precise designations that can serve as more effective conservation tools, focusing conservation resources where needed and minimizing regulatory burdens where not necessary.

Question 5. How does a designation of critical habitat impact ESA section 10 permit requirements, as well as section 7 consultation on the issuance of permits, and how are Service field staff trained regarding the relationship between critical habitat, species presence, and likelihood of "take"?

Answer. Under section 7 of the Act, Federal agencies consult with the Services to insure that the actions they carry out, fund, or authorize are not likely to destroy or adversely modify critical habitat. This requirement extends to our issuance of section 10 permits. As is the current practice, the Service will continue to conduct intra-Service consultations on the issuance of our permits, including consulting on effects to designated critical habitat. Service field staff have been conducting consultation on critical habitat under guidance issued in 2004, which is now captured in the new regulations regarding the new definition of adverse modification. In addition, our section 7 courses delivered by the National Consultation Training Center all incorporate instruction on the relationship between critical habitat, species presence, and the likelihood of "take." All section 7 consultations are subject to a rigorous review process within the Ecological Services field offices before they are finalized.

Question 6. How does the designation of areas "at a scale determined by the Secretary to be appropriate" ensure that such designation fulfills the ESA requirement that "specific areas" be designated?

Answer. The purpose of this language is to clarify that the Secretary cannot and need not make determinations at an infinitely fine scale. Thus, the Secretary need not determine that each square inch, square yard, acre, or even square mile independently meets the definition of "critical habitat." Nor will the Secretary necessarily consider legal property lines in making a scientific judgment about what areas meet the definition of "critical habitat." Instead, the Secretary has discretion to determine at what scale to do the analysis. In making this determination, the Secretary may consider, among other things, the life history of the species, the scales at which data are available, and biological or geophysical boundaries (such as watersheds), and any draft conservation strategy that may have been developed for the species. Since the Act does not specify at what scale a "specific area" is to be measured, the Services have discretion to interpret and apply the requirement in a reasonable way.

Question 7. The rule represents that where "several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, the Secretary may designate an inclusive area as critical habitat." How does designation of areas that fail to include the elements required for designation as critical habitat, and are only "proximate to" areas that include the elements for designation, satisfy the ESA's requirements?

Answer. Our rule continues this provision from the prior rule (at 50 CFR 424.14(d)) and merely recognizes that were several individual areas satisfy the definition of critical habitat and are located close together, an entire, inclusive area may be designated instead of the many smaller areas, for greater clarity. This is not a

novel interpretation and is not intended to authorize designation of large areas that do not meet the definition of critical habitat. The rule recognizes the Secretaries authority to provide connectivity between and among several smaller habitats with important habitat characteristics.

Question 8. The rule expands the definition of adverse modification to include alterations that would "preclude or significantly delay development" of physical or biological features. How is this expansion of adverse modification—to now encompass the preclusion or delay of features' development—a permissible construction of the ESA's language, which appears to require designated critical habitat to consist only of habitat in existence at the time of designation?

Answer. The second sentence of the revised regulatory definition indicating that activities which preclude or significantly delay development of physical or biological features may result in destruction or adverse modification does not represent a new concept or an expansion of authority. In fact, the Service has been applying this concept since, at least, the issuance of the 2004 and 2005 documents that provided guidance on the Services' "destruction or adverse modification" analyses. This approach is necessary to effectuate the statute's and courts' direction that critical habitat must be protected for the contributions it is expected to make to the species' conservation over time.

The Services also believe this forward-looking assessment is consistent with the ESA. The ESA defines critical habitat to include both areas occupied at the time of listing that contain features "essential to the conservation" of listed species, as well as unoccupied areas that are "essential for the conservation" of listed species. Thus, unoccupied habitat by definition is not required to contain essential physical or biological features to qualify for designation, and even occupied habitat is not required to contain all features throughout the area designated as critical habitat. The conservation value of designated habitat that exists at the time of designation may depend in part on the inherent ability of the habitat to support the essential features over time. Thus, the Services will generally conclude that a Federal action is likely to "destroy or adversely modify" designated critical habitat if it precludes or significantly delays the development of physical and biological features such that the action appreciably diminishes the value of critical habitat for the conservation of the species.

Question 9. You stated in the hearing that these rules maintain the status quo regarding designation of critical habitat. If that is the case, then why was this rulemaking conducted or necessary? Should the regulated public truly expect no change in practice, outcome, or project requirements to arise in future consultations? If not, what are the types of situations in which these rules would impose new or additional requirements on entities engaged in section 7 consultations that would differ from what those entities are accustomed to seeing?

Answer. The two recent regulations and recent policy clarify the interpretations and practices the Services have developed and applied over many years of experience implementing the Act. The Services revised the definition of "destruction or adverse modification," because two Federal Courts of Appeals determined in 2001 and 2004 that the 1986 regulatory definition set too high of threshold for triggering destruction or adverse modification. The revised definition, which is consistent with the ESA, its legislative history and circuit court opinions, codifies the approach the Services have employed since 2004.

The other rule clarifies the procedures and standards used for designating critical habitat, making minor changes to the regulations to better describe the scope and purpose of critical habitat, add and remove some definitions, and clarify the criteria and procedures for designating critical habitat. This rule also revises the Services' regulations to be consistent with statutory amendments made in 2004 through the National Defense Authorization Act (Public Law 108–136) that make certain lands managed by the Department of Defense ineligible for designation as critical habitat.

Finally, the new policy is intended to provide greater predictability, transparency and consistency regarding how the Services consider exclusion of areas from critical habitat designations. Under the ESA, the Services evaluate the economic, national security and other impacts of a designation and may exclude particular areas if the benefits of doing so are greater than the benefits of including the area in the designation, so long as the exclusion will not result in the extinction of the species. This final, non-binding policy describes the general position of the Services for considering different situations relative to the exclusion process (e.g., voluntary conservation agreements, national security, and economics).

Question 10. Please put a finer point on whether, where, and how critical habitat under the final rules would impose additional, tangible effects on a regulated entity

over and above what is likely to already be imposed due to the species listing itself. Is designating critical habitat the only way species habitat is protected within a section 7 consultation? Your statement in the hearing that "the juice is not worth the squeeze" raises questions regarding whether the concerted effort to designate critical habitat is worthwhile for the species.

Answer. Designating critical habitat is not the only way species habitat is protected within a section 7 consultation. Every formal consultation, even in the absence of a critical habitat designation, serves to provide the Service's opinion of whether an action is likely to jeopardize the continued existence of a listed species. The jeopardy analysis focuses on the effects on an action to the species, specifically whether the action reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species. Often those effects to the species are caused by effects to its habitat. Accordingly, reasonable and prudent alternatives to avoid the likelihood of jeopardy, or reasonable and prudent measures to minimize take of the species, may both involve aspects of habitat protection that reduce the effect of the action on the species. However, the additional requirement of the statute to consider whether an action is likely to destroy or adversely modify designated "critical habitat" requires the Services to consider impacts to the value of the designated critical habitat itself. Unlike with the jeopardy determination, there is no requirement to demonstrate that there are ultimately impacts on the species via impacts to the habitat.

Designation of critical habitat may impose additional, tangible effects on a regulated entity over and above what is likely to already be imposed due to the species listing itself in situations where the designated critical habitat is not occupied and a section 7 consultation would not otherwise be triggered. However, this has always been the case, and we do not expect the final rules to have significant additional impacts to regulated entities when compared to the prior regulations and policies, but rather codify practices that have been the status quo for many years. We expect that these final rules will provide greater certainty to regulated entities about how critical habitat may affect them.

Questions Submitted by Representative Paul A. Gosar

Question 1. Director Ashe, have you studied up on the *draft recreational boating Compatibility Determination (CD)* for Havasu National Wildlife Refuge announced by the Service April 12 that aims to close significant areas to motorized boating activities on Lake Havasu? Your Deputy Director, Jim Kurth, knew detailed information about this proposal when I questioned him on March 22, yet you claimed to know nothing about this pressing matter when I questioned you at the hearing.

Answer. Yes, I have been made aware of the draft recreational boating Compatibility Determination for Havasu National Wildlife Refuge.

Question 2. How many new acres will restrict horsepower or prohibit waterskiing, wakeboarding, fishing and other recreational boating if the CD is implemented?

Answer. Fluctuating water levels affect the width of the river and varies throughout the seasons, dam releases, and other environmental factors making it difficult to provide consistent acreage. We are providing the estimated acreages based on January 2015 water levels. Below are the total acres that were proposed motorized boating restrictions in the withdrawn draft CD:

In total approximately 4,500 acres [1] were proposed to have restriction changes.

- ~4,000 acres (proposed 30 hp motor limit and no-wake allowed) in Topock Marsh.
- ~500 acres were in the proposed ~2-mile expansion of the existing ~17.5-mile regulations. No-wake restrictions were also proposed in this same ~2-mile area.

Question 3. Does that figure include all areas within the main channel of the lower Colorado River, in the backwaters of the lower Colorado River, within the 4,000 acre Topock Marsh, within the ½ mile no-wake zone form May 2015, the no-wake restrictions in the Topock Marsh, the horsepower restrictions in the Topock Marsh, and the proposed area from the no-wake zone down to Mesquite Bay?

[1] Acres refers to acres of water surface from January 2015 and is subject to change throughout the year.

Answer. The numbers in the previous response included all areas within Havasu National Wildlife Refuge (Refuge) jurisdiction. No new restrictions were proposed in the existing ~17.5 mile stretch on the main River channel (which includes the ½ mile no-wake zone designated in 2015). The total number of restricted acres described in Question 1 included all proposed restrictions in Topock Marsh and the proposed ~2-mile area from the no-wake zone down to Mesquite Bay.

Question 4. How many total acres within the Refuge, including the Havasu Wilderness Area, already restrict horsepower or prohibit waterskiing, wakeboarding, fishing and other recreational-towed devices?

Answer. The following are existing restrictions on the Refuge:

- Approximately 4,400 acres of the ~17.5-miles (within the main River channel and its backwaters) prohibit water-skiing, tubing, wake boarding or other recreational towed devices as well as wake and personal watercraft as indicated by signs and buoys. This includes:
  - —Approximately 150 acres of Devil's Elbow are designated no-wake.
  - —Approximately 26 acres near the I-40 bridge and Topock 66 Marina are designated no-wake.
- Approximately 100 acres of Mesquite Bay are closed to motorized watercraft.

Question 5. How many total acres on Lake Havasu already restrict horsepower, have no-wake zones or prohibit certain motorized boating activities, including restrictions by BLM and other government agencies?

Answer. The Service does not know how many acres are impacted by boating restrictions imposed by other government agencies including the BLM. Within Refuge jurisdiction, approximately 100 acres of Mesquite Bay are closed to motorized watercraft. North of Mesquite Bay is the ~100 acre no-wake restriction of 2015.

Question 6. Of the 700 acres of the Havasu reservoir on the Refuge, how many acres will have restricted horsepower or prohibit waterskiing, wakeboarding, fishing and other recreational boating if the CD is implemented?

Answer. Approximately 700 acres within the Refuge portion of the ~19,300 acre Lake Havasu Reservoir will have restricted uses.

It is important to note that at the southern end of the Refuge, the Refuge boundary is defined by the state line bisecting the river. Therefore, the California side of the river channel is not within the Refuge boundary and is not included in these ~700 acres. As such, applicable California regulations will remain unchanged.

Question 7. In a July 10 response from your agency to my letter objecting to the May 2015 boating restrictions for the Havasu Refuge which were made 2 days before Memorial Day and without public comment, the Service stated that these arbitrary restrictions were lawful under its regulations in the form of 50 CFR 32.22. That particular regulation deals with regulations for hunting and fishing within the Refuge. The Service is now citing a different regulation to justify these restrictions. Was that a mistake or did your agency fail to identify the proper authority prior to making the May 2015 closure?

Answer. The no-wake zone was established in May 2015 based on the following facts as identified by Refuge staff and visitors: (1) wake-causing motorized boating in the area impacts crucial riparian and wetland habitat needed for foraging, breeding, loafing and nesting for a wide variety of residential and migrating birds including the Clarks and Western grebe and endangered Ridgeway's rail; (2) wake-causing motorized boating in the area posed threats to non-motorized boaters because wakes generated by high speed motorized boats in narrow channels and backwaters cannot readily dissipate resulting in unsafe conditions and potential to capsize or swamp non-motorized users; (3) wake-causing motorized boating in the area is impacting refuge-dependent wildlife in the area causing shoreline erosion of their habitat, bird strikes, vegetation destruction and floating nest disturbance. The Service takes all concerns regarding risks to visitor and natural resource safety seriously and is committed to being responsive when conflicts arise. Safety concerns regarding wake speeds and water depth brought to the attention of refuge management prompted further evaluation of uses impacting refuge resources.

Although the header for 50 CFR 32.22 relates to Sport Fishing, all boating regulations for the Refuge fall under this category. It was appropriate to have boating restrictions under 50 CFR Part 32 when making fishing compatible with the refuge-specific mission, Service mission, and to ensure public safety. On September 13, 2005 the Refuge regulations were revised in the Code of Federal Regulations and 50 CFR 32.22 paragraph D incorporated subparagraphs 1 through 6 to include

regulations on Topock Marsh, 17 miles of the main river channel and Mesquite Bay. The May 2015 ½ mile backwater no-wake designation was an extension of the 17-mile existing regulations.

The regulatory guidelines used to make this designation is present not only in the Code of Federal Regulations (50 CFR 32.22 and 25.21), but also in the guiding legislation for the National Wildlife Refuge System and The National Wildlife Refuge System Improvement Act of 1997 (Improvement Act), which amended the National Wildlife Refuge System Administration Act of 1966. The Improvement Act states, "Wildlife-dependent recreational uses may be authorized on a refuge when they are compatible and not inconsistent with public safety." The threshold to determine compatibility is outlined in the Improvement Act and Service policy. The threshold is high and the Refuge Manager has the authority to impose restrictions to make an activity compatible. Wildlife-dependent recreational opportunities, such as fishing, get precedence over non-wildlife uses.

Question 8. The Service has since changed its justification for the May 2015 restrictions as the CD states these restrictions were lawful under 50 CFR 25.21(e). This regulation allows temporary closures in the "event of a threat or emergency endangering the health of the general public or Refuge resources." This isn't the EPA Animas spill and there is no pending threat or emergency. Further, the CD states that a NEPA categorical exclusion was allowed for the May 2015 restrictions "due to the absence of controversy related to environmental impacts." There was plenty of controversy and the Service knew about it as documented in multiple Freedom of Information Act requests. I will ask you again, what legal authority does your agency cite to go around arbitrarily closing motorized boating activities in areas utilized by recreational enthusiasts for decades?

Answer. No areas have been or are proposed to be closed to motorized boating.

The Service believes the May 2015 decision met the considerations discussed in 50 CFR 25.21. The regulation states, "In the event of a threat or emergency endangering the health and safety of the public or property or to protect the resources of the area, the Refuge Manager may close or curtail refuge uses of all or any part of an opened area to public access and use in accordance with the provisions in § 25.31, without advance notice." The threat may relate to the endangerment of refuge users as well as to protect the resources of an area.

The Service takes all concerns regarding risks to visitor and natural resource safety seriously and is committed to being responsive when conflicts arise. Because this area is shallow and narrow, high-speed boats may not be able to safely share the waterway with non-motorized craft thereby creating a threat to users. Safety concerns regarding wake speeds and water depth were brought to the Service's attention. The Service investigated the matter and found that there were conflicts in uses posing safety concerns and impacts to resources. This review prompted further evaluation of all boating uses impacting refuge resources. The Refuge found the no-wake designation in the backwater, known to some visitors as "speed alley," to be a necessary action for the continued safety of the public and the protection of area resources.

The now withdrawn draft CD stated that a National Environmental Policy Act (NEPA) categorical exclusion was allowed for the May 2015 restrictions "**due to the absence of controversy related to environmental impacts**." This allowance specifically states controversy related to environmental impacts, not recreation. The Service is aware of little to no controversy regarding the effects that boating restrictions will have on natural resources.

Question 9. I appreciate you granting our request to hold a public meeting in Lake Havasu City. Why wasn't a meeting scheduled here in the first place? Why did the Service only schedule two public meetings on this matter, both on the same Tuesday at the same location in Laughlin, Nevada?

Answer. The Service's compatibility policy 603 FW 2, section 2.12A(9) provides guidance on public review and comment. The Service is required to provide an opportunity for public review for a minimum of 14 days. No public meetings are required. In this case, however, we believed it was important to hear from the community directly, so we initially committed to holding two public meetings at a venue in Laughlin, Nevada because it could accommodate a large group and was easily accessible to interested parties in three states. Due to significant community interest in Lake Havasu City, the Service agreed to hold a third public meeting in Lake Havasu City. We secured a venue in Lake Havasu City, however there was concern the location would be unable to accommodate the expected number of participants. After our public announcement of the Lake Havasu City meeting, the Mayor of Lake Havasu City and others offered use of the Aquatic Center, which could hold a large

capacity of people. We were pleased to accommodate that request once we became aware of the availability.

Question 10. On April 29, 21 bipartisan members of the House *expressed concern about the CD and requested a 60-day extension of the comment period*. This same request has been made by Lake Havasu City Mayor Mark Nexsen, the Arizona Game and Fish Department and the Lake Havasu Area Chamber of Commerce. Will the Service adhere to these requests for a 60-day extension of the public comment period? If not, why not?

Answer. The Service is committed to better understanding the concerns raised by local stakeholders and encourages public participation. As such, a public meeting was held on May 2, 2016 in Lake Havasu City and two additional meetings were held in the surrounding area of Laughlin on May 3, 2016. Due to the level of interest in recreational boating on the Refuge, the Service decided to expand the public comment period from 30 days to 60 days making the new closing date June 13, 2016. For ease of access, the Draft CD was made available for review and comment at the following Web site: www.fws.gov/refuge/havasu.

Question 11. Is the agency intent on seeking to impose the CD prior to Memorial Day Weekend?

Answer. The Service did not impose any new restrictions prior to Memorial Day weekend, 2016. The draft CD was withdrawn following the close of the comment period.

Question 12. Will you scrap the CD announced April 12, 2016?

Answer. The CD released on April 12, 2016 was a draft proposal. It was not finalized. The Service intends to work with local community leaders and others before moving forward with any revised proposal.

Question 13. The current refuge manager has demonstrated a clear conflict of interest and disregard for public involvement in this process. If the Service chooses to move forward with the CD, will you encourage Regional Director Tuggle to make the final decision as to whether or not to implement the CD and remove that decision from the current refuge manager?

Answer. The Service is unaware of a conflict of interest. The Refuge Manager is an employee of the Service and was acting within the scope of her position and authorities when she designated the no-wake zone to ensure visitor safety and initiated the draft CD.

As directed by the Improvement Act, the Service promulgated regulations establishing the process for determining whether the use of a refuge is a compatible use (50 Code of Federal Regulations Part 26.41). The regulations direct the Refuge Manager to only permit a new use, or expand or renew an existing use, if it is determined the use is a compatible with the Refuge's purpose. These regulations outline the procedures for documenting compatibility determinations including what a compatibility determination must contain and who has the authority to make the final decision. The regulations give the authority for making the decision to the Refuge Manager and Regional Refuge Chief.

All decisions on final determination are made after close coordination with Regional Director, Dr. Benjamin Tuggle.

Question 14. What is the primary justification for the expanded boating restrictions found in the CD?

Answer. Wildlife-dependent recreational uses may be authorized on a refuge when they are compatible and consistent with public safety and the purpose of the Refuge. The provisions to determine compatibility is outlined in the Improvement Act and Service policy. The Refuge Manager has the authority to impose restrictions to make an activity, such as boating, compatible with the purpose of the Refuge.

The Refuge Improvement Act of 1997 states the following:

> "3) With respect to the System, it is the policy of the United States that—(A) each refuge shall be managed to fulfill the mission of the System, as well as the specific purposes for which that refuge was established; (B) compatible wildlife-dependent recreation is a legitimate and appropriate general public use of the System, directly related to the mission of the System and the purposes of many refuges, and which generally fosters refuge management and through which the American public can develop an appreciation for fish and wildlife;
>
> (4) In administering the System, the Secretary shall—'(A) provide for the conservation of fish, wildlife, and plants, and their habitats within the

> System; (B) ensure that the biological integrity, diversity, and environmental health of the System are maintained for the benefit of present and future generations of Americans;"

In 1990, the U.S. Fish and Wildlife Service (Service) began a Comprehensive Management Plan (CMP) for the lower Colorado River refuges (U.S. Fish and Wildlife Service 1994). The CMP specifically addressed boating in the following goals and objectives:

> "Goal #12 is to reduce levels of non-wildlife oriented recreation on the River channel that runs through the lower Colorado River refuges, to eliminate all non-wildlife oriented recreation that is not compatible, to increase the quality experience related to natural values by all River visitors, and to raise public awareness of the lower Colorado River ecosystem values.
>
> Objective #2 under Goal #12 is to protect wildlife resources by implementing the appropriate zoning policy for sensitive areas of the Refuges, especially those pertaining to endangered species. Each Refuge Manager will review existing refuge zoning regulations and implement zones that take into account refuge purposes and the proximity to other jurisdictions that are more conducive to the non-wildlife oriented uses (i.e., water-skiing areas, jet skiing areas).

The CMP provided a list of secondary uses not planned to occur at any of the lower Colorado River National Wildlife Refuges because they do not conform to uses, which could be, in a regulated manner, "compatible" with the purposes of the Refuge, or they have been determined to be harmful to refuge resources. The CMP underwent close coordination with a number of entities, as well as public comment and the NEPA process.

Additionally, the Fish and Wildlife Service Manual 603 FW2 states the Service will ". . . re-evaluate compatibility determinations for all existing uses other than wildlife-dependent recreational uses when conditions under which the use is permitted change significantly, or if there is significant new information regarding the effects of the use, or at least every 10 years, whichever is earlier. Additionally, a Refuge Manager always may re-evaluate the compatibility of a use at any time."

To comply with the Improvement Act and Service Manual standards, the Service proposed several restrictions in the draft CD.

Question 15. What objective analysis, science and statistics do you have to support the CD?

Answer. The purpose of a CD is to determine if a use is compatible or not compatible with the Service mission and Refuge purpose(s). Per the Service Manual 603 FW 2, "A proposed or existing wildlife-dependent recreational use or any other use of a national wildlife refuge that, based on sound professional judgment, will not materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission or the purposes of the national wildlife refuge."

The Refuge is required to maintain biological integrity, diversity, and environmental health for the benefit of migratory birds and all other species that feed, breed, and shelter on the Refuge. Recreational high-speed boating can adversely impact Refuge habitats and wildlife. Refuge staff and visitors have witnessed the flushing of birds, nest disturbance, bird strikes, and habitat destruction from wake-causing motorized boating. Because boats produce emissions, turbulence from propulsion, wakes, pollution and noise, the Refuge Manager must evaluate where these specific uses may occur as these factors may affect wildlife use patterns, use of particular habitats, feeding behavior and early departure of migratory birds dependent on the Refuge as a resting ground. As the land management agency responsible for the protection of endangered species and other wildlife, all potential impacts must continue to be evaluated for their compatibility with the refuge purpose.

The withdrawn draft CD found that boating is compatible with the National Wildlife Refuge System mission and the Refuge purpose with proposed restrictions. The Service is committed to working collaboratively with local community leaders to find a path forward that both meets the needs of the community and the purpose of the Refuge as well as supports the Service's mission.

Question 16. What alternatives, if any, were considered prior to releasing the CD?

Answer. The Service is responsible for reviewing existing refuge zoning regulations and implementing zones that take into account refuge purposes and the proximity to other jurisdictions that are more conducive to the non-wildlife oriented uses (i.e., open water for high-speed uses, like Lake Havasu). Based on sound professional judgment, refuge management evaluated area locations and uses to determine potential negative impact to refuge resources and visitors participating in

priority public uses. The Service considered several alternatives, including a "no action" alternative when developing the draft CD, before pursuing the alternative with proposed restrictions identified in the draft CD.

Question 17. Other than employees within the Service, who was consulted prior to releasing the CD and what is your record of consultation?

Answer. The Service believes the draft Compatibility Determination was consistent with the principles outlined in the Comprehensive Management Plan of 1994, the current guiding document for Havasu National Wildlife Refuge management. The CMP underwent public comment in 1991 and NEPA prior to its completion in 1994.

During the CMP planning process, meetings were held with the following agencies and organizations: Arizona Game and Fish Department; California Department of Fish and Game; Nevada Department of Wildlife; California Department of Parks and Recreation; Arizona State Parks; BLM; Bureau of Indian Affairs; Department of the Air Force; Chemehuevi Indian Tribe; Fort Mojave Indian Tribe; Colorado River Indian Tribe; city of Lake Havasu, Arizona; city of Blythe, California; city of Needles, California; Colorado River Environmental and Wildlife Society (Martinez Lake, Arizona); Sierra Club; Audubon Society; Yuma Rod and Gun Club; Palo Verde Rod and Gun Club; Lake Havasu City Chamber of Commerce; Parker Arizona Chamber of Commerce; Golden Shores/Topock Chamber of Commerce; Arizona Wildlife Federation; Arizona Department of Environmental Quality; Arizona Department of Water Resources; Arizona State Lands Department; Arizona Nature Conservancy; Lake Havasu City Bass Club; and Arizona Trappers Association. The U.S. Bureau of Reclamation was also a cooperating agency in this project.

Public meetings were held as follows:

August 28, 1991, Yuma, Arizona

August 29, 1991, Blythe, California

August 30, 1991, Lake Havasu City, Arizona

August 31, 1991, Needles, California

Question 18. According to the Service's own estimates, nearly 3 million visitors vacation at Lake Havasu each year and a typical holiday weekend draws nearly 50,000 boaters to the area. According to a 2008 Lake Havasu City Tourism Survey, nearly 75 percent of tourists are interested in waterskiing, wakeboarding or boating while visiting Lake Havasu. The survey also revealed tourists spend more than $200 million and support nearly 4,000 full-time equivalent jobs. Did the Service carefully consider the economic impacts that could result from the CD? If so, what specific actions did the Service take to mitigate any economic harm?

Answer. Currently, 17.5 miles of the Colorado River on the Refuge restrict certain uses.

It is important to note that significant numbers of visitors participate in several priority public uses including hunting, fishing, wildlife observation and photography, environmental education and interpretation on the Refuge. Due to the number of uses on the Refuge, the Service anticipates visitors would continue to visit the Refuge in large numbers and bring commerce to the local area. To highlight one of the many user communities that visit the Refuge, anglers and fishing groups are some of the highest users of Lake Havasu. High-grossing fishing tournaments continue to bring these wildlife-dependent users to the area. According to Lake Havasu City's Convention and Visitors Bureau, fishing tournaments on Lake Havasu can require up to $200 solely for team admission. We also expect the fishing community will continue to use boating vendors in the Havasu area and fishing continues to be allowed in all areas of proposed restrictions. As another example of tourist activities, the Refuge is part of a major migratory bird migration route along the western coast of the United States making the Refuge a birding hotspot with 318 bird species drawing in bird enthusiasts and wildlife photographers, all of whom will continue to add to the local economy.

Question 19. In November 2013, the Fish and Wildlife Service inflated costs for fixing a broken water supply line by millions of dollars and attempted to terminate the rainbow trout stocking program at Willow Beach, threatening 1,700 jobs and $75 million in associated economic output. It took significant efforts from myself, Senator McCain, and others to reverse that terrible decision. Why does the Service continue to ignore important associated economic impacts for Mohave County prior to implementing new restrictions and unilaterally changing programs?

Answer. The U.S. Fish and Wildlife Service (Service) has completed construction of a long-term water supply system for the Willow Beach National Fish Hatchery.

With recognition of your support, the Service announced the successful completion of the floating pipeline project on August 5, 2016.

The Service understands that the fish supplied by our National Fish hatcheries provide important economic and recreational opportunities to the states, tribes, and recreational communities. Since its construction, the Willow Beach National Fish Hatchery has long helped provide economic benefits to Arizona. It was devastating to the Service, tribes, the local community and many others when, due to age and wear, the hatchery experienced a significant water supply system failure, leading to the loss of 40,000 fish in 2013. Tremendous efforts were made to save as many fish as possible and to look at potential alternatives to repair the system.

Early cost estimates to completely revamp the system and implement safeguards against a future failure were very high. For more than a year, the Service met with the Arizona Game and Fish Department, Mohave County of Arizona, and the National Park Service to develop viable, less costly solutions. The team agreed on a project proposal (Floating Pump) that provides a sufficient and reliable water supply system at an estimated cost is $776,448. In a partnership agreement, the Arizona Game and Fish Department (AZG&FD) and the Service agreed to share costs, with AZG&FD providing $389,000.

Following a competitive bid process, Performance Systems, Inc. was selected to complete the project for $801,506. Modifications were made to take additional precautionary measures, including installation of safety measures for regular maintenance and creation of a barrier to prevent invasive quagga mussels from entering the pipeline. This increased costs by an additional $211,704. The Service is covering these additional costs through its operations and maintenance accounts.

Now that testing of the new water conveyance system is completed, trout production will recommence at Willow Beach NFH. To better meet the needs of anglers, the Service will continue to work with AZG&FD to expedite initial production of trout and shorten the time frame for catchable size trout to be available. The Service will also work on a stocking schedule with the AZG&FD to ensure that the fishing experience can be enjoyed the entire season.

Question 20. I want to now turn my attention to the Mexican Wolf, an issue that is very important to the southwestern states. On November 13, 2015, the four governors from the states of Arizona, Colorado, New Mexico and Utah *sent a bipartisan letter* expressing serious concerns and a unified position in opposition to the "Service's [new] planned approach to recovery plan development" for the Mexican gray wolf. On December 11, 2015, House Committee on Oversight and Government Reform Chairman Chaffetz, Subcommittee of Interior Chairman Cynthia Lummis, House Natural Resources Committee Chairman Rob Bishop and several of our colleagues reiterated those very valid concerns in a letter to you and Secretary Jewell. In a February 3, 2016 response to that letter, you stated, "The Service has initiated recovery planning discussions with the states of Arizona, Colorado, New Mexico and Utah; Federal agencies in Mexico; and independent and objective scientists from the United States and Mexico."

Question 21. Why exactly is the Service having planning discussions with Colorado and Utah?

Answer. The Service has a unique relationship with the states in recovery and management of threatened and endangered species, as laid out in the Endangered Species Act. The states of Colorado and Utah have been involved in recovery planning for the Mexican wolf since 2003, when our recovery planning efforts were focused on a Distinct Population Segment that included those states up to Interstate 70. Subsequently, they were invited to participate in the Mexican Wolf Recovery Team that was appointed in 2010, which focused on the Mexican wolf subspecies rather than a Distinct Population Segment. During that recovery planning effort, some scientific experts on the Science and Planning Subcommittee of the recovery team considered habitat north of I-40 in Arizona and New Mexico as potentially suitable habitat for recovery efforts. More recently, Colorado and Utah have also been participating in the recovery planning workshops that commenced in December 2015 to assist the Service in the development of our revised Mexican wolf recovery plan which is due to be published in November 2017.

Question 22. The wolf has had no presence in these states historically. Are you all looking at expanding the habitat of the Mexican wolf to include territories in Colorado and Utah?

Answer. The Service has no current plans to reintroduce Mexican wolves into either Utah or Colorado. The Service, the states of Arizona, Colorado, New Mexico, and Utah; the Mexican government, and scientists from both countries are currently assessing the amount of suitable habitat and prey in Mexico that could contribute

to recovery. We will consider this information in combination with our population objective of 300 to 325 wolves in the Mexican Wolf Experimental Population Area to determine whether recovery is possible south of I-40 in the southwestern United States and in Mexico. If, based on this information, we are not successful in identifying sufficient habitat to support recovery, we will look elsewhere for additional suitable habitat to achieve Mexican wolf recovery. Recent genetic evidence in published scientific literature indicates that gene flow occurred between Mexican wolves and other gray wolf subspecies as far north as Utah.

Question 23. Despite the fact that 90 percent of the Mexican wolf's historic range is in Mexico, the Service seems committed to restoring Mexican wolves only in the United States. Why?

Answer. The Service has demonstrated a commitment to binational collaboration with Mexico in Mexican wolf recovery since the inception of the binational Mexican wolf captive breeding program in the early 1980s. We continue to have an active relationship with Federal agencies in Mexico to implement field activities for the reintroduction efforts in both countries. In addition, Mexico Federal agencies have participated in our recovery plan revision processes in 2003 and 2010, as well as our current series of workshops. In April, we held a recovery planning workshop in Mexico City (following December 2015 and March 2015 meetings in Arizona) to ensure robust participation by Mexico Federal agencies and independent scientists. In addition to gathering and assessing scientific information at the workshop, we also discussed avenues for binational collaboration in the recovery of the Mexican wolf. The Service and Federal agencies in Mexico will continue to explore mechanisms for a binational recovery effort.

Applicable information for determining areas suitable for Mexican wolf recovery includes suitable habitat features, adequate prey, and low human density. As is our standard, the Service will use the best available scientific information to evaluate appropriate areas for Mexican wolf recovery. We expect to complete the recovery plan by November 2017.

Question 24. You also stated in your February 3, 2016 response "The revised recovery plan will also provide estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal." Do you have any preliminary estimates of those costs and time that you can share with the committee today?

Answer. No. The information on costs and time will depend on the actions needed to recover the Mexican wolf. This information will be provided in the draft recovery plan, which is currently under development and is expected to be completed by the end of 2016.

Question 25. On January 16, 2015 the U.S. Fish and Wildlife Service announced its decision to list the Mexican wolf as an endangered subspecies and arbitrarily expanded the range the wolves can roam in Arizona and New Mexico under Section 10(j) of the ESA.

Why did your agency violate the Anti-Deficiency Act and fail to secure funding for the 10(j) nonessential experimental Mexican wolf population program before implementing this new program? Regional Director Tuggle admitted this fact on a conference call with stakeholders announcing the program.

Answer. The Service did not arbitrarily expand the range into which Mexican wolves can be released and disperse in New Mexico and Arizona in the revised 10(j) Rule. The revised 10(j) Rule thoroughly analyzed the expansion of the Mexican Wolf Experimental Population Area (MWEPA). This expanded area will promote Mexican wolf population growth, genetic diversity, and management flexibility. The regulatory flexibility provided by our revisions to the 1998 Final Rule, including expansion of the MWEPA, will allow the Service to take management actions within the MWEPA that further the conservation of the Mexican wolf while being responsive to needs of the local community in cases of problem wolf behavior. There is no basis for the allegation that the Service has in any way violated the Anti-Deficiency Act in its implementation of the revised 10(j) Rule.

Question 26. The Service has been producing genetically modified wolves ever since the January 2015 announcement and 45 percent of those died last year. On your watch the population of the Mexican wolves in the wild actually declined by 12.5 percent last year. Why is the Service doing such a terrible job managing Mexican wolf populations?

Answer. The experimental population has demonstrated several years of strong growth in recent years (2011–2014). The Mexican wolf pups that were documented in the wild in 2015 were all born in the wild to wild parents, which demonstrate that the population continues to self-perpetuate and is not demographically reliant

on releases from captivity. In the 2014 Environmental Impact Statement for the Proposed Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf, we projected a 10 percent average annual growth of the population, which anticipates that there will be years with less than and greater than that projected growth rate. It is normal for population growth of any species to fluctuate over time.

Recovering the Mexican wolf into its historic landscape has unique challenges unlike other gray wolf recovery programs. In the Northern Rocky Mountains, gray wolves were captured in Canada and released directly into Yellowstone National Park and the Central Idaho Wilderness. In contrast, the reintroduction of the Mexican wolf has been reliant on the release of captive bred Mexican wolves because Mexican wolves were completely eliminated from the wild by the 1980s. We captured seven of the last remaining wolves and developed a binational captive breeding program. From this captive population of seven founder wolves, we began releasing wolves back into the wild in the Apache National Forest in 1998. In addition, unlike Yellowstone National Park, which was a large swath of protected lands to reintroduce wolves into, the Apache National Forest is a working landscape, and thus we need to address effects of wolves on livestock production, hunting, and recreation.

Question 27. I have heard serious concerns from cattleman and ranchers in my district since you made that arbitrary decision in January 2015. How many Mexican wolf attacks have occurred since that January 16, 2015 decision? How many attacks have occurred since the wolf was first listed in 1976 and been under your agency's care?

Answer. There have been no Mexican wolf attacks on humans since the reintroduction program began in 1998. Any person has the right to take a Mexican wolf in self-defense or the defense of another person.

We recognize that livestock depredation occasionally occurs. Between 1998, when our reintroduction effort began, and 2013, we documented 184 confirmed cattle depredations by Mexican wolves. More recently, in 2014, we documented 30 cattle mortalities from wolves; in 2015, we documented 52 cattle mortalities and 8 cattle injuries, and so far in 2016 we have documented 8 cattle mortalities.

Question 28. Has the Service done genetic testing on Mexican wolves? If so, how many? What were the results?

Answer. Yes, we conduct genetic testing. We monitor the genetics of the wild population by taking blood samples from every canid handled, as well as through the collection and testing of scat in some areas. All samples are sent to the University of Idaho for species confirmation, meaning the samples are determined to be from a pure Mexican wolf, pure coyote, pure dog, etc. Since reintroduction of Mexican wolves began in 1998, the Fish and Wildlife Service has detected three instances of hybridization between Mexican wolves and domestic dogs. In all three cases the offspring were removed and euthanized. We have not detected other evidence of Mexican wolves hybridizing with dogs or coyotes.

Question 29. Mr. Ashe, we know that the Endangered Species Act requires Fish and Wildlife Service (FWS) to consult with and receive input from counties affected by petition listings and regulations written as a result of ESA listings. In your testimony you talked about the successful partnerships the Service has engaged in over the years to carry out your work. However, this committee, the Natural Resources Committee, and dozens of Members' offices are flooded with complaints about how the Service blatantly disregards state and local input when formulating new regulations and policy. I am not sure we can even count how many lawsuits you have pending against your agency from states who clearly feel that they were not involved in the decisionmaking process. Just this week New Mexico state officials notified your agency regarding their intent to sue over your new plan to release captive Mexican wolves into New Mexico to "cross-foster" with wild packs in an attempt to infuse some DNA diversity into the wild population. I don't know how you choose to define collaboration, but all these lawsuits don't really sound like the rosy kumbaya cooperation your agency tries to depict to this committee. Why is New Mexico planning to sue you from your perspective?

Answer. The Service values the partnership we have with the New Mexico Department of Game and Fish, and it remains our policy to consult with the states and others in our joint efforts to recover species. Recovery of the Mexican wolf remains the Service's goal. We have a statutory responsibility and the authority to recover the Mexican wolf and strive to do so in a collaborative manner with our partners. We continue to engage the state of New Mexico in the Mexican Wolf Recovery Program, even though they have withdrawn as a partner agency. We are

also involved in meetings with them regarding their recent notice of intent to sue regarding the Service's continued activities to recover the Mexican wolf so that it can be delisted and returned to state management. The remaining lead agencies have primary regulatory jurisdiction and management authority of the Mexican wolf in Arizona and New Mexico. Graham, Greenlee, Gila, and Navajo counties in Arizona, and the Eastern Arizona Counties Organization are designated as cooperators to the reintroduction project with an interest in Mexican wolf management. The MOU, which expired in 2008, was revised and signed by the cooperators in and subsequent to 2010. The Service remains committed to involving all partners and vested parties in managing Mexican wolves.

Question 30. The Mexican wolf has lingered on the Endangered Species list for more 40 years. The Service has utilized the same flawed recovery plan for the Mexican wolf since the early 1980s. This plan does not comply with Federal law as it does not contain objective and measurable recovery data for delisting as required by 4(f)(1) of the ESA. Why has you agency failed to comply with those requirements of law? How much longer do you expect the Mexican wolf to linger on the Endangered Species Act?

Answer. The Service intends to publish a final revised recovery plan by November 2017 that incorporates the best available scientific information. The revised recovery plan will, to the maximum extent practicable, provide measurable and objective criteria which, when met, will enable the Service to remove the Mexican wolf from the list of endangered species and turn its management over to the appropriate states and tribes. The revised recovery plan will also provide estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal.

Our greatest conservation need at the current time is to improve the genetic health of the experimental population, which has a high level of relatedness and is experiencing inbreeding. We will improve the experimental population's genetic health by releasing additional Mexican wolves from the captive population, which is more genetically diverse because we are able to actively manage breeding pairs to maintain gene diversity. The experimental population is expected to contribute toward the recovery of the Mexican wolf; however, the establishment of additional populations of Mexican wolves in Mexico or the United States is likely to be necessary to achieve recovery based on our current scientific understanding, though that cannot be confirmed until the recovery plan is developed. Expediency in improving the genetic health of the experimental population is critical to moving the Mexican wolf toward recovery.

Questions Submitted by Representative Norma J. Torres

Question 1. Mr. Ashe: If the critical habitat designation does not necessarily restrict further land development, than what is done by the Fish & Wildlife Service and National Marine Fisheries Service to dispel that notion to the public?

Answer. We include the following language on all proposed and final critical habitat rules and shorter summaries of this language in our outreach materials for all designations:

> *"Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat."*

Additionally, we have testified on numerous occasions that critical habitat does not necessarily preclude further land development. Finally, our field staff, who work with local landowners on a regular basis, provide guidance on Endangered Species Act requirements, including providing clarification that critical habitat designations

do not restrict private land development that does not involve Federal permits or other authorizations.

Question 2. Mr. Ashe: On November 3, 2015 the President issued a memorandum, "Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment." What role does that play into this discussion about critical habit designations? What impact has the issuance of that new guidance had, if any?

Answer. The Presidential Memorandum, Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, encourages private investment in restoration, including through public-private partnerships, and helps foster opportunities for businesses or non-profit organizations with relevant expertise to successfully achieve restoration and conservation objectives across all lands.

The Service published on March 8, 2016, a draft revision of the Service's Mitigation Policy, which has guided agency recommendations to address these issues since 1981. This new policy is intended to provide a broad and flexible framework to facilitate conservation that addresses the potential negative effects of development, while allowing economic activity to continue.

The primary intent of the draft policy is to apply mitigation in a strategic manner that ensures an effective link with conservation strategies at appropriate landscape scales, consistent with the Presidential Memorandum, the Secretary of the Interior's Order 3330 entitled "Improving Mitigation Policies and Practices of the Department of the Interior" (October 31, 2013), and the Departmental Manual Chapter (600 DM 6) on Implementing Mitigation at the Landscape-scale (October 23, 2015).

The draft revised policy will serve as an over-arching guidance applicable to all actions for which the Service has specific authority to recommend or require the mitigation of impacts to fish, wildlife, plants, and their habitats, including those covered by the ESA. We intend to adapt Service program-specific policies, handbooks, and guidance documents, consistent with applicable statutes, to integrate the spirit and intent of this policy.

Mrs. LUMMIS. Thank you, Mr. Ashe.

The Chair now recognizes Mr. Bernhardt for 5 minutes.

STATEMENT OF DAVID L. BERNHARDT, SHAREHOLDER, BROWNSTEIN HYATT FARBER SCHRECK, LLP; FORMER SOLICITOR FOR THE U.S. DEPARTMENT OF THE INTERIOR 2006–2008, WASHINGTON, DC

Mr. BERNHARDT. Good morning, members of the committee. I appreciate the invitation to testify before you today. I am here to share my own views with you, views that are informed by my experience of working on the ESA issues for nearly—or I guess over, now—two decades, including while serving as Solicitor for the Department of the Interior.

Given the breadth of today's hearing, and the number of panelists you will hear from, I request that my written statement be submitted for the record, and I will summarize with three points.

First, Director Ashe and his team should be commended for taking the effort to try to improve outdated regulations. As Mr. Grijalva said, the executive branch is entitled to place its gloss on the ESA and how it wants it to be executed, subject to certain provisos. Those provisos are: it must operate within the statute; it must comply with the Administrative Procedure Act; and other procedural requirements.

Second point—the recent regulatory changes by the Services, when taken together, in my opinion are likely to exacerbate, not minimize the conflict and controversy associated with implementing the Act. Most importantly, to achieve the Administration's policy objectives, the Service's regulations are untethered from both

their statutory text and Congress' clear direction. I will discuss how they do so in two specific ways, after providing you a bit of background.

As the Chairman stated in his opening statement, in most instances under the ESA any time a Federal agency wants to fund, carry out, or authorize someone else to conduct activities that may affect a listed species designated critical habitat, the agency must ensure that it is not likely to destroy or adversely modify the habitat. This is generally determined through an interagency process with one of the Services.

If the agency cannot make such an assurance, they cannot proceed without an exemption from the Species Committee. This is where the rubber meets the road under Section 7 of the Act. These are consequential, not inconsequential decisions by government.

Here, with their new regulations, the Service has modified the definition of the terms "destruction" and "adverse modification." In doing so, they have placed a new duty on Federal agencies. This duty is not just to refrain from making the present condition of habitat worse, but to refrain from doing anything that would significantly preclude or delay the habitat from developing conservation features in the future, even where those features do not now and may never exist.

This is contrary to the Act, which grants the Services the authority to designate any habitat of a species that has just been listed when it is then considered to be critical habitat. It does not grant them the authority to designate habitat, which is not then considered to be critical habitat, but may become critical habitat at some point in the future.

The statute does not provide for the designation of not yet but might one day be critical habitat. Instead, the ESA provides the Services with the authority to deal with changes that may occur in the future by authorizing them to make changes to their critical habitat designations as it becomes clear what those changes actually are—i.e. as the features actually develop.

Second, the Services have fundamentally and improperly altered the role of designating unoccupied habitat in the ESA's regulatory scheme, going forward. Under the Services' new reading of the definition of the term "critical habitat," they assert that Congress, by defining "critical habitat" in a particular way, intended to grant the Services a larger authority to designate areas where the species did not exist when it was listed than the area they actually occupied at the time of listing.

As I describe in my testimony, this newfound assertion of authority flatly contradicts both the legislative intent, as shown through the legislative history of the definition of "critical habitat," and the words of that definition itself. The Service's claim that the term "essential" can be read so broadly cannot be squared with the definition of "critical habitat."

Simply put, defining "critical habitat" in the way it did in 1978, Congress was deeply concerned about the amount of habitat, even in occupied areas that would be deemed critical, and sought to carefully limit it. The Administration's changes reflect a policy goal. That policy goal is appropriate. And if they want this authority, they should come to Congress and ask for it.

Thank you for the time.
[The prepared statement of Mr. Bernhardt follows:]

PREPARED STATEMENT OF DAVID BERNHARDT, BROWNSTEIN HYATT FARBER SCHRECK, LLP (FORMER SOLICITOR FOR THE DEPARTMENT OF THE INTERIOR 2006–2008)

Mr. Chairman and members of the Committee on Natural Resources, I appreciate the invitation to testify today, and I appreciate the opportunity to share my own views with you. These views are informed by my experience of working on the Endangered Species Act ("ESA" or "Act") issues for over 20 years, including while serving as the Solicitor of the Department of the Interior, as an attorney in private law practice, and as a Congressional aide. Given the breadth of today's hearing, and the number of panelists, I have four points to make:

- The U.S. Fish and Wildlife Service ("Service") and NOAA Fisheries (Collectively "Services") should be commended for making the effort to provide greater clarity to its employees and to the public by working to improve the implementation of the ESA. Efforts to modify longstanding regulations regarding the implementation of the ESA are never without criticism;
- The executive branch is entitled to place its gloss on how the ESA will be executed, provided it operates within the scope of the statute and complies with the Administrative Procedure Act;
- The Obama administration's promulgation of two regulations, one related to the designation of critical habitat, the other redefining the term "destruction or adverse modification," and the finalization of one policy describing how the Services intend to utilize their authority to exclude areas from critical habitat designations are, together, likely to exacerbate, not minimize, the conflict and controversy associated with the implementation of the ESA; and
- To achieve the Obama administration's policy objectives the Services' regulations have been untethered from both their statutory text and Congress's clear direction.

UNDERSTANDING A FEDERAL AGENCY'S DUTY TO ENSURE THAT THEIR ACTIONS ARE NOT LIKELY TO RESULT IN THE "DESTRUCTION OF ADVERSE MODIFICATION" OF DESIGNATED CRITICAL HABITAT

Under the ESA, the primary consequence of a critical habitat designation is found in Section 7(a)(2) which states,

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected states, to be critical, unless such agency has been granted an exemption for such action by the committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.[1]

Therefore, Section 7(a)(2) essentially, absent an exemption from the Endangered Species Committee, precludes actions by Federal agencies that are "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of its critical habitat.[2] To effect that preclusion, an agency contemplating action[3] that it believes may implicate Section 7(a)(2) is required to consult with the respective Service to determine whether the action is likely to have the precluded effect, and, if so, what reasonably prudent alternatives can be implemented to modify its action so that it comports with the statutory stricture.[4] Formal consultation is initiated by a Federal action agency's submission of a Biological Assessment, although the Services will engage in informal discussion and exchanges of information before a Biological Assessment is completed. The duty to consult applies to "ongoing agency action[s]" as well as

[1] 16 U.S.C. § 1536(a)(2).
[2] *Id*.
[3] The Federal agency seeking to consult is commonly referred to as the "action agency," whereas the Services are commonly referred to as "consulting agencies."
[4] *Id*.; see also, e.g., *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 518–519 (9th Cir. 2010).

future actions.[5] In general, the consultation process is occurs each time a Federal agency is contemplating funding, carrying out, or authorizing someone else to carry out a discretionary activity that may effect a listed species or its designated critical habitat.

It is here, as part of this consultation analysis, where the question of what physical and biological features are encompassed by the designation of critical habitat and the application of the meaning of the term "destruction or adverse modification" of critical habitat is most important. Here, the Services' must determine if the agency's proposed action destroys or adversely modifies designated critical habitat. Depending upon the Service's conclusion, the action agency will choose to proceed, accept a modification to its proposal, seek an exemption from the Endangered Species Committee, or simply decide not to proceed forward with its action.

IMPOSING A NEW DUTY ON FEDERAL AGENCIES TO ENSURE THEIR ACTIONS ARE UNLIKELY TO DESTROY OR ADVERSELY MODIFY FEATURES THAT DO NOT AND MAY NEVER EXIST BEFORE PROCEEDING WITH THEIR ACTIONS

Since 1986, the Services' regulations defined the term "destruction and adverse modification" as

> a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.[6]

The term "destruction and adverse modification" now means:

> a direct or indirect alteration that appreciably diminishes the value of critical habitat ***for the conservation*** of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species ***or that preclude or significantly delay development of such features.***[7]

(Emphasis added). When the Obama administration finalized this new definition, they explained that in their view, the

> revised definition codifies our practices and provide Service biologists a clear and consistent benchmark within the regulations to use when making their determination of "destruction or adverse modification". While this revised definition replaces one that the courts found improper, we do not expect that its application will alter the number of "destruction or adverse modification" findings compared to recent years. In other words, we do not expect it to be substantially more or less protective of critical habitat than the internal guidance we have used in recent years.[8]

I wish they were right, but from my vantage point they are almost certainly wrong. They have chosen to impose a new duty on action agencies. This duty is unprecedented and will over the course of time prove to be very significant.

The ESA granted the Services the authority "to designate any habitat of [a species that has just been listed] which is then considered to be critical habitat."[9] It did not grant them the authority to designate habitat which "is [not] then considered to be critical habitat," but that may become critical habitat at some point in the future, depending on the effects of climate change or other factors. Instead, the ESA provides the Services with the authority to deal with changes that may occur in the critical habitat of a species in the future by authorizing them to make changes in their designations as it becomes clear what those changes are. The ESA states that the Services "may, from time-to-time thereafter [i.e., after the designation of habitat that is critical habitat at the time of listing] as appropriate, revise such designation."[10] The ESA does not grant them the authority to predict what changes may be necessary in the future and to designate habitat as critical now that is not

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[5] *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1053 (9th Cir. 1994); Wild Fish Conservancy, 628 F.3d at 518.

[6] 51 FR 19926, June 3, 1986; codified at 50 CFR 402.02.

[7] 81 FR 7226, February 11, 2016, codified at 50 C.F.R. 402.02.

[8] Revision of the Definition of "Destruction or Adverse Modification" of Designated Critical Habitat Questions and Answers available at: http://www.fws.gov/endangered/improving_ESA/AM.html.

[9] 16 U.S.C. § 1533(a)(3)(A).

[10] *Id.*

presently needed, even though that habitat may (or may not) be needed at some indefinite point in the future.

By seeking to protect presently unneeded and non-existent features from "destruction or adverse modification," the Services have imposed an unprecedented new affirmative duty on Federal agencies to recover listed species by forcing them to refrain from actions that would adversely modify, not the present capacity of the habitat to aid in the recovery of a species, but the potential of the habitat to develop new features in the future that might provide additional aid in the recovery of the species. In doing so, they require Federal agencies not just to refrain from making the present condition of the habitat worse, but to also refrain from doing anything that would prevent the condition of the habitat from getting better, or developing conservation features in the future. While this may be a desirable goal, it is not what the ESA requires of action agencies under Section 7(a)(2).[11]

Also troubling, from my perspective, is that the Services have not placed any boundaries on their expected evaluation of the impacts to presently unneeded potential features that may (or may not) develop for their employees, for other agencies or for the public. Instead they have explained, that they "consider [designated critical habitats] future capabilities only so far as we are able to make reliable projections with reasonable confidence."[12] The lack of clear parameters places tremendous discretion in the hands of field staff. It will almost certainly foster speculation on whether any area might eventually develop the physical and biological features that do not presently exist.

A BIG CHANGE REGARDING THE DESIGNATION OF UNOCCUPIED AREAS AS CRITICAL HABITAT

Magnifying the future conflict that I anticipate arising from the new definition of "destruction or adverse modification," is the novel approach to designating critical habitat in areas not occupied by listed species finalized by the Services. Primarily to deal with the anticipated effects from climate change, the Services have fundamentally altered the role that the designation of unoccupied areas has historically played in the ESA regulatory scheme. Whatever one may think of the Services' concern for the effects that climate change may have on critical habitat, their changes to 50 CFR § 424.12 to deal with those effects almost certainly exceed their authority under the ESA.

The ESA grants the Services the authority to designate unoccupied areas as critical habitat only if those areas are "essential for the conservation of the species."[13] Clearly, an unoccupied area cannot be "essential for the conservation of [a] species" if the occupied area is adequate to insure its conservation. Thus, it is impossible to claim that an unoccupied area is "essential for the conservation of [a] species" without knowing how the species would fare if the unoccupied area were not designated.

Under the Services' new reading of the definition of "critical habitat," they assert that Congress, by defining "critical habitat" in the way it did-i.e., by defining unoccupied areas as critical habitat if they were deemed "essential" to the conservation of the species by the Services-intended to grant them a larger authority to designate unoccupied areas as critical habitat. This interpretation is far broader than they have previously recognized. Indeed, it is actually far broader than the authority Congress granted them for the designation of occupied areas.

This newfound assertion of authority is contradicted by the legislative history of the definition of critical habitat. The ESA as originally passed in 1973 did not contain a definition of "critical habitat." Concerned about the issues raised by the snail darter case, *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), Congress adopted its own definition of "critical habitat" in 1978, which remains the definition today. Congress provided a statutory definition of critical habitat that was narrower than the Service's original regulatory definition; it changed the definition from a focus on "constituents," the loss of which would "appreciably decrease the likelihood of the survival and recovery of a listed species," to a focus on "physical and biological features" that are "essential to the conservation of a species." The Services now read "essential," however, in a way that would broaden the definition of "critical habitat" far beyond that contained in the Services' original definition that was rejected by Congress. They read "essential" as encompassing potential features, the loss of which (if the features actually develop) may (or may not) at some unspecified point in the future reduce the likelihood of the survival and recovery of the species

[11] 16 U.S.C. § 1536(a)(2).
[12] 81 FR 7220, February 11, 2016.
[13] Id. at § 1532(5).

by some unspecified degree, depending on the accuracy of their predictions about the effects of climate change.

In addition to being in conflict with the legislative history, the Services' claim that "essential" may be read that broadly cannot be squared with the rest of the language in the definition of critical habitat. Congress, in defining "critical habitat" in the way it did in 1978, was deeply concerned about the amount of habitat, even in occupied areas, that would be deemed critical and sought to carefully limit it, not grant a broad new authority to designate it.

In the definition, Congress placed three limitations on the amount of occupied areas that could be designated. First, it limited critical habitat to those occupied areas that presently have "those physical and biological features . . . essential to the conservation of the species."[14] But even that was not limited enough, so it added a second limitation. It defined critical habitat in such a way that only those areas with the requisite features that also required "special management considerations or protection" could be designated.[15] Finally, to make sure that its intent to limit the amount of occupied habitat that could be designated was clear, it stated that "[e]xcept in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species."[16]

The Services' changes to their regulations based on their new reading of the definition of "critical habitat," legitimately reflect a policy goal that the Administration feels is important, but if they wanted such authority they should have sought the legislation to garner such authority rather than trying to shoehorn it into a regulatory change which will be litigated for years to come.

CONCLUSION

Mr. Chairman and members of the committee, the actions taken by the Administration are significant. The Administration should be complemented on its effort to try to address these important issues. However, they should be called on to reconsider their potential to cause unnecessary conflict by creating a new mandate thereby misapplying the requirements that Federal agencies have under Section 7(a)(2) of the ESA and by taking an expansive view of their power to designate critical habitat where the listed species do not exist and that habitat is not presently needed.

I welcome any questions you may have.

Mrs. LUMMIS. Thank you, Mr. Bernhardt.

Mr. Mehrhoff, you are recognized for 5 minutes.

STATEMENT OF LOYAL MEHRHOFF, ENDANGERED SPECIES RECOVERY DIRECTOR, CENTER FOR BIOLOGICAL DIVERSITY, WASHINGTON, DC

Dr. MEHRHOFF. Thank you very much, Vice Chair Lummis, Ranking Member Grijalva, and members of the committee. My name is Loyal Mehrhoff, and I am the Endangered Species Recovery Director at the Center for Biological Diversity. I want to thank you for giving me the opportunity to testify on the benefits that critical habitat provides to endangered species.

Before joining the Center last year, I spent over 20 years working on endangered species with the U.S. Fish and Wildlife Service, the U.S. Geological Survey, and the National Park Service. My last assignment was as the field supervisor of the Pacific Islands Fish and Wildlife Office in Hawaii. I have been involved in the listing and critical habitat designation process for dozens of endangered species in Hawaii and elsewhere. These experiences have provided me with a front-row seat to the valuable role critical habitat plays

[14] 16 U.S.C. § 1533(5).
[15] *Id.*
[16] *Id.*

not only in preventing extinctions, but also in promoting the recovery of endangered species.

But first, I think it is important to remember that the Endangered Species Act remains one of the most successful conservation laws ever passed by any nation. It has prevented the extinction of the vast majority of the species that have come under its protection. Without the Act, scientists have estimated that at least 227 species in the United States would have gone extinct in the last 40 years.

Critical habitat is an essential tool in preventing extinctions. Simply put, if you want to protect endangered species, you need to protect the places where they live. Scientific studies have shown that endangered species with critical habitat are twice as likely to be on the road to recovery as species that do not have critical habitat.

Critical habitat designations show the general public and land managers where endangered species live, so that we can better target our conservation efforts on those most important places. By drawing lines on a map, critical habitat focuses voluntary conservation activities by Federal, state, and local governments on those priority habitats. It also helps clarify for Federal agencies which geographic areas require additional consultation.

By identifying mitigation and other reasonable conservation measures during the Section 7 consultation process, critical habitat provides significant regulatory protections against Federal actions that could adversely modify or destroy it. The consultation process almost never stops projects outright, but rather, it steers activities away from the most sensitive habitats and ensures that all significant impacts are properly mitigated.

To illustrate, the Palila, which is a small songbird on the Big Island of Hawaii, had its habitat degraded as a result of non-native ungulates, primarily introduced sheep and goats, on the slopes of Mauna Kea. When the state of Hawaii's Federal Highway Administration and the U.S. Army chose to realign an important road across the island, critical habitat designations helped ensure that the new route for the road avoided important habitats, compensated for the loss of some critical habitat when it could not be avoided, and minimized fire risks from the new road.

More recently, Palila's critical habitat has been fenced to protect it from goats and sheep, and begin the long process of restoring habitat. Without having these lines on the map, effective conservation of the Palila would probably not be occurring.

So, without question, critical habitat works. It identifies which areas are important, focuses restoration actions on those priority areas, and provides important protections for irreplaceable areas that endangered species rely upon for their survival and recovery.

Thank you again for the opportunity to speak today.

[The prepared statement of Dr. Mehrhoff follows:]

PREPARED STATEMENT OF LOYAL A. MEHRHOFF, ENDANGERED SPECIES RECOVERY DIRECTOR, CENTER FOR BIOLOGICAL DIVERSITY

Good morning, Mr. Chairman, Ranking Member, and members of the committee. My name is Loyal Mehrhoff, and I am the Endangered Species Recovery Director at the Center for Biological Diversity. On behalf of the Center and its more than 1 million members and supporters, I want to thank you for giving me the

opportunity today to testify on the benefits that critical habitat provides under the Endangered Species Act, and the Services' recently finalized rules relating to critical habitat.

Prior to joining the Center in 2015, I spent 5 years as the field supervisor of the U.S. Fish and Wildlife Service's Pacific Islands Office in Hawaii, and before that I spent 3 years as the director of the U.S. Geological Survey's Pacific Island Ecosystems Research Center. I was integrally involved in the listing and critical habitat designation process for dozens of endangered species in Hawaii, and I know from personal experience in Hawaii that critical habitat provides significant benefits to endangered species and is often the key to their recovery. Research has shown that species with designated critical habitat are twice as likely to be on the road to recovery as species that do not have designated critical habitat.[1]

THE BENEFITS OF CRITICAL HABITAT

First, it is important to recognize that the Endangered Species Act is one of the most successful conservation laws ever passed by any nation on Earth, and has prevented the extinction of 99 percent of the species under its protections. Today, a majority of the species protected by the Act are either stable or improving. Scientists estimate that without the Act's protection, at least 227 species in the United States would have gone extinct.[2]

With respect to threats to endangered species, habitat destruction remains the leading cause of species imperilment and extinction both here in the United States and around the world.[3] Congress recognized this stark reality when it passed the Endangered Species Act in 1973:

> Man can threaten the existence of species of plants and animals in any of a number of ways, by excessive use, by unrestricted trade, by pollution or by other destruction of their habitat or range. The most significant of those has proven also to be the most difficult to control: the destruction of critical habitat.[4]

In the 1978 Amendments to the Endangered Species Act, Congress defined critical habitat to include both occupied and unoccupied areas that are essential to the conservation of threatened and endangered species. And by defining "conservation" as using all available tools and measures to improve a species' condition "to the point that the protective measures of the Act are no longer required," Congress made clear that the purpose of critical habitat is to further the recovery of listed species to achieve the fundamental goals of the Endangered Species Act: to prevent extinction and to move species toward recovery.

As the Fish and Wildlife Service correctly explained in their recently finalized rules, critical habitat serves multiple functions in implementing the Act.[5] Most simply, by telling the public and land managers where endangered species live or roam, we can better target conservation efforts to benefit those species. By drawing lines on a map, critical habitat facilitates conservation activities by other Federal agencies, which are required to use their authorities to develop programs that benefit endangered species under Section 7(a)(1) of the Act. Critical habitat also focuses conservation efforts of states and local governments, nongovernmental organizations, and individuals. Critical habitat also helps to develop efficient and effective habitat conservation plans, and can guide the development of recovery plans and planning efforts.

Finally, by identifying mitigation and other reasonable conservation measures during the Section 7(a)(2) consultation process critical habitat provides significant regulatory protection by ensuring that Federal agencies do not adversely modify or destroy critical habitat. It is important to note that the consultation process almost

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[1] Taylor and Suckling et. al, 2005. The effectiveness of the Endangered Species Act: a quantitative analysis. Bioscience 55(4) at 362.

[2] *See* Suckling, K. et. al., 2012. On time, on target: how the Endangered Species Act is saving America's wildlife. Center for Biological Diversity, http://www.esasuccess.org/report_2012.html.

[3] *See*, e.g., Pimm, S.L. et al., 2014. The biodiversity of species and their rates of extinction, distribution, and protection. Science 344: DOI: 10.1126/science.1246752; Wilcove, D.S., et al. 1998. Quantifying Threats to Imperiled Species in the United States: Assessing the relative importance of habitat destruction, alien species, pollution, overexploitation, and disease, BioScience 48:607–615.

[4] H. Rep. No. 93–412, 93d Cong., 1st Sess. (July 27, 1973).

[5] 79 Fed. Reg. 27066, 27067.

never stops Federal projects.[6] Instead, the consultation process steers development away from the most sensitive areas and ensures that the remaining significant impacts are properly mitigated. Critical habitat designations do not affect private development on private lands if there is no Federal nexus or Federal permit required. Nor does it, as if often claimed, establish de-facto wilderness areas or limit public access to public lands. Critical habitat designations are therefore quite compatible with economic development if when mitigation and reasonable conservation measures are utilized.

Despite the clear requirement in the Act that listing and critical habitat designation occur concurrently to the greatest extent practicable, more than half of endangered species have not received critical habitat designations.[7] Freshwater fish and mussels in the Southeast, for example, are some of the most rapidly declining endangered species, and most of these did not received critical habitat when they were listed. The failure to designate critical habitat ultimately makes recovery for these species slower and more costly than what likely would have occurred had critical habitat been designated.

When critical habitat is designated, endangered species often benefit significantly. The following examples demonstrate this reality:

Palila: The Palila is a small songbird found in the high elevation forests of Hawaii's Big Island. This bird was first protected in 1967 and received critical habitat in 1977.[8] The Palila's habitat had been consistently degraded as a result of non-native ungulates on the slopes of Mauna Kea. It took more than 30 years before appropriate management of Palila habitat was fully implemented. During that time the Palila numbers rose and fell. Current management—which emphasizes habitat restoration—is designed to accelerate Palila recovery. When a realignment of Saddle Road through critical habitat was undertaken, the required consultation ensured that mitigation for impacts occurred and that Palila was protected from increased fire risk resulting from this road work. Today, some of the most important areas of critical habitat have been fenced off to protect the forests from over-browsing by non-native species. Without these lines on the map, adequate management for Palila habitat would have been much more challenging.

Dusky Gopher Frog: The dusky gopher frog was listed in 2001, but critical habitat was not designated until 2012.[9] Although it was once common from Louisiana to Alabama, the frog is now only found in four locations in southern Mississippi. With a population of just a few hundred individuals, it is one of the most endangered frogs in the United States. During its early years of protection under the Endangered Species Act, the frog's populations continued to drop. After critical habitat was designated, additional actions were taken to save the species. In 2013, an agreement with the Center, other non-profit groups, and private landowners resulted in 170 acres of critical habitat being purchased and protected from development. This land, which will be owned by the Land Trust for the Mississippi Coastal Plain, will be shielded from development. Together with a recovery plan finalized in 2015, this frog has a fighting chance of survival.

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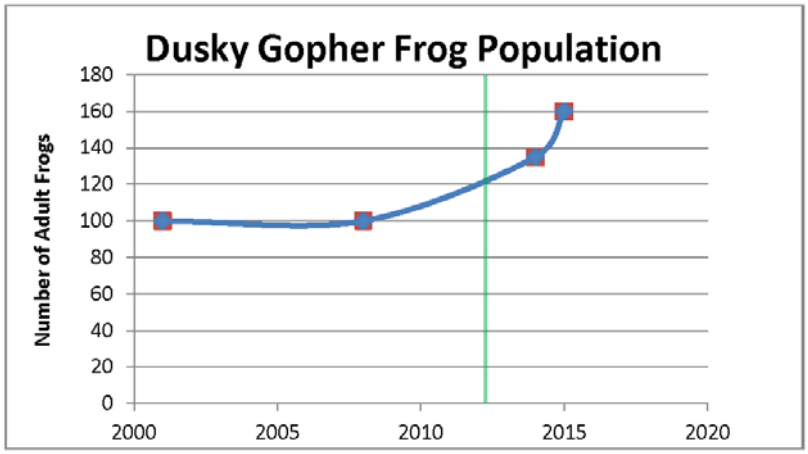
[6] Malcom and Li, 2015. Data contradict common perceptions about a controversial provision of the U.S. Endangered Species Act. PNAS 112(52) at 15844–15849, www.pnas.org/cgi/doi/10.1073/pnas.1516938112 (Out of an analyzed 6,829 formal consultations between 2008 and 2015, only one biological opinion of the Service reached a jeopardy opinion. In that instance, the project was still allowed to proceed by adopting reasonable prudent alternatives (RPAs) to mitigate adverse effects on the species, pursuant to Section 7(b)(3)(A) of the Act.)

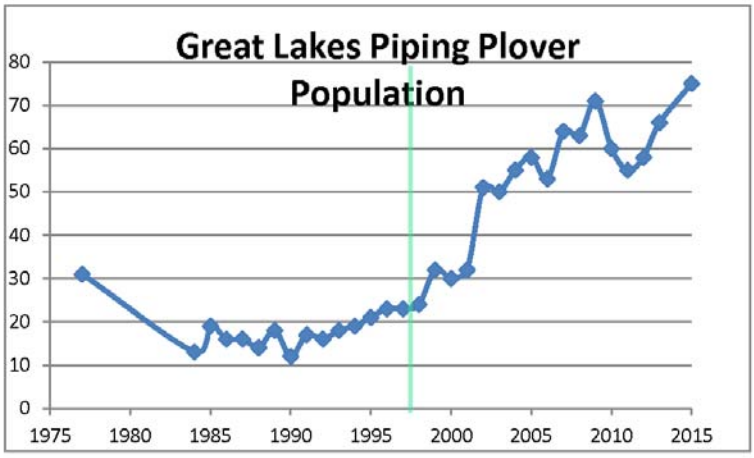
[7] Taylor and Suckling et. al, 2005 at 360–367.

[8] 32 Fed. Reg 4001; 42 Fed. Reg. 40685–40690.

[9] 77 FR 35117-35161 (June 12, 2012), available at http://ecos.fws.gov/tess_public/profile/speciesProfile.action?spcode=B079.

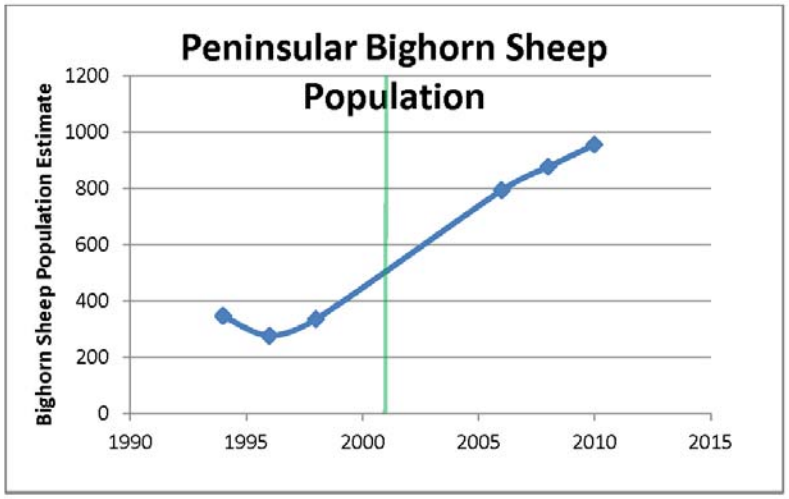


Atlantic and Great Lakes Piping Plover: Piping plovers were protected under the Endangered Species Act in 1985,[10] but did not receive designated critical habitat until 2001. Following its listing, intensive management to stabilize its populations was undertaken to address direct threats to the plover, such as predator management programs for raccoons, crows and ravens. These early efforts led to small increases in plover populations in the Great Lakes and Northeast. However it was not until after 2001 when critical habitat was designated, that populations truly rebounded. Critical habitat made it easier for land managers to identify areas where common-sense restrictions on beach use—such as limits on off-highway vehicles—should be deployed to protect nesting birds. The Northeast population has now exceeded its recovery plan goal of 625 nesting pairs for more than 10 years and continues to grow.



[10] 50 Fed. Reg. 50726–50734 (Dec. 11, 1985).

Peninsular bighorn sheep: Although the U.S. Fish and Wildlife Service first listed it as an endangered species in 1998, little was done initially to protect its habitat.[11] Bighorn sheep numbers along the Southern California Peninsular Mountain range had already declined by 77 percent due to livestock overgrazing, road development and urban sprawl. By the year 2000, there were just 334 individuals left, leaving more golf courses in the Palm Springs area than bighorn sheep. In 2001 the Service designated 845,000 acres of critical habitat.[12] The population subsequently grew from the low point of 334 animals in 2001 to approximately 955 animals in 2010 in the Palm Springs area.



Steller's sea lion (Eastern DPS): The Steller's sea lion was protected under an emergency listing in 1990.[13] Shortly after listing, critical habitat was designated in 1993 along the coasts of Alaska, Oregon and California, and groundfish trawling was banned within the sea lion's critical habitat. The population thereafter increased from roughly 21,000 animals in 1989 to 63,488 in 2009. In 2014, the eastern Distinct Population Segment of the Steller's sea lion was declared recovered and delisted.[14]

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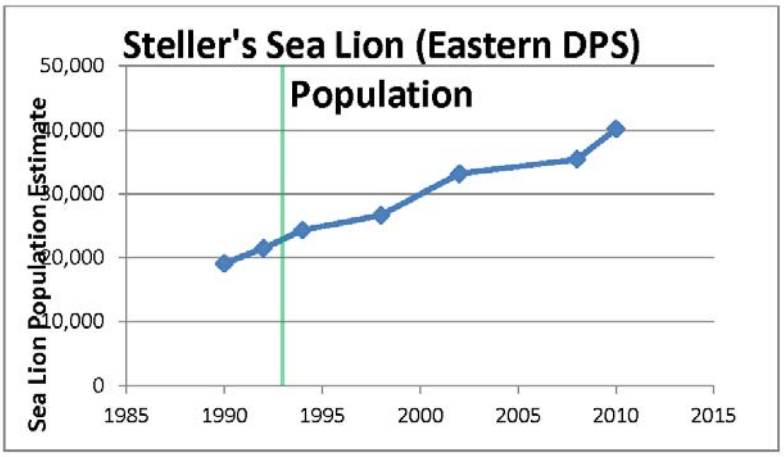
[11] 63 Fed. Reg. 13134–13150 (March 18, 1998), available at https://ecos.fws.gov/docs/federal_register/fr3225.pdf.

[12] 66 Fed. Reg. 8650–8677 (Feb. 1, 2001), available at https://ecos.fws.gov/docs/federal_register/fr3703.pdf.

[13] 55 Fed. Reg. 13488 (April 10, 1990), available at http://ecos.fws.gov/docs/federal_register/fr1683.pdf.

[14] 79 Fed. Reg. 42687–42696 (July 23, 2014), available at http://www.gpo.gov/fdsys/pkg/FR-2014-07-23/pdf/2014-16756.pdf.



THE SERVICES FINAL RULES ON "ADVERSE MODIFICATION" OF CRITICAL HABITAT, CHANGES TO THE 424 REGULATIONS, AND FINAL POLICY ON 4(B)(2) EXCLUSIONS

The Center submitted extensive comments on each of these three changes to the rules implementing critical habitat under the Act. I summarize our concerns and analysis below for each final rule.

The Services finalized definition for the phrase "destruction or adverse modification" is legally invalid as it fails to give independent meaning to beyond what is prohibited under the Services' jeopardy standard. Section 7 of the Act prohibits Federal agencies from taking actions that jeopardize the continued existence of listed species or result in destruction or adverse modification of critical habitat. Where Congress uses the word "or" it is generally accepted that phrases on either side of the "or" have independent meaning.[15] In the final rule, the prohibition on "destruction or adverse modification" is effectively the same as the prohibition on jeopardy because the prohibition applies only to any action that "affects the value of the critical habitat as a whole for the conservation of a listed species."[16] The reality is that where such activities reach this high threshold, a species will almost always be jeopardized as well. Furthermore, by not defining "destruction" separate from "adverse modification" the Services also failed to give independent meaning to each type of impact to critical habitat. As a practical consequence, this regulation will not result in changes in existing practice during consultations. In the final rule, the Services state: "We do not expect this final rule to alter the section 7(a)(2) consultation process from our current practice, and previously completed biological opinions do not need to be re-evaluated in light of this rule."[17] This is unfortunate if it is proven to be true. A recent study from Defenders of Wildlife showed that of more than 80,000 biological opinions completed over the past 8 years, only one resulted in a jeopardy finding, and none resulted in a finding of "destruction or adverse modification" of critical habitat.

The Services finalized rulemaking changes to the regulations at 50 C.F.R. § 424 will generally only have minor impacts on the process the Services use to designate critical habitat.[18] The most notable change is that the Services will no longer identify the "primary constituent elements" ("PCEs") of critical habitat, but rather will identify the "physical or biological features" of critical habitat when it designates "occupied" critical habitat. This change better tracks the statutory language of the Act, and is easier to understand than PCEs, which had no basis at all in the Act, and were generally confusing to the public. This change will likely have no effect,

[15] *Howell-Robinson v. Albert*, 384 B.R. 19, 21 (D.D.C. 2008) (A statute's words are to be interpreted according to their ordinary sense and with the meaning commonly attributed to them).
[16] 80 Fed. Reg. 7214, 7218 (Feb. 11, 2016), available at https://federalregister.gov/a/2016-02675.
[17] 80 Fed. Reg. 7214, 7216.
[18] 81 Fed. Reg. 7413–7440 (Feb. 11, 2016), available at https://federalregister.gov/a/2016-02680.

either positive or negative, on the size of a species' critical habitat designation. Other changes to the 424 regulations are mainly ministerial in nature.

The Services finalized policy regarding critical habitat exclusions under Section 4(b)(2)[19] of the Act may represent an improvement over existing practice in evaluating possible exclusions from a final critical habitat designation. However, only time will tell if the Services use the policy as it was intended, or instead simply continue their existing practices. It is important to note that the current practice for evaluating exclusions varies considerably between the U.S. Fish and Wildlife Service and National Marine Fisheries Service. The Fisheries Service's approach to exclusions is transparent and understandable because the agency evaluates each potential exclusion separately based on the conservation value of the particular area. In contrast, the Fish and Wildlife Service approach is not transparent, and is instead based on vague generalizations about the "value" of conservation partnerships. Having eight criteria to evaluate non-binding, not-federally approved conservation plans could be an important step forward in making the exclusion process fairer and more protective of endangered species. It is important that the Services identify and map habitat excluded under 4(b)(2) on the same maps showing designated critical habitat. These areas are excluded due to value of conservation plans, as such they are expected to play a positive role in the recovery of the species. Identifying them on maps in the Federal register will help ensure that their important role is not forgotten by future planners, managers and conservationists.

Although not a subject of today's hearing, the Service also finalized a rule in August of 2013 on the timing of economic analyses of critical habitat.[20] The rule accomplished three separate things. First, it officially split listing rules and critical habitat designations into two separate rulemaking proposals. Second, it required the Services to provide their economic analysis at the time the proposed designation is released to the public. Third, it requires the Services to use an "incremental" economic analysis when assessing critical habitat economic impacts. The Center opposed the Services' decision to segregate the critical habitat proposal from the listing proposal, as it drastically increases the cost of completing each document and therefore reduces the number of species the Services can protect in a given year. The Center notes that the Fish and Wildlife Service generally is unable to complete their economic analyses of critical habitat at the same time that they release the proposed critical habitat designation, and therefore must reopen the public comment period regularly. This also adds unnecessary cost to the listing program. Finally, the Center agrees that an incremental economic analysis is the most appropriate methodology for conducting economic analyses, as it follows the government-wide approach required by the Office of Management and Budget as detailed in OMB Circular A-4, which was finalized in 2003 during the George W. Bush administration.[21]

CONCLUSION

Critical habitat is a key and proven tool in recovering species under the Endangered Species Act. Weakening or undermining its effectiveness only slows down recovery, and means that species will be on the list of endangered species longer, something that all parties agree is not a desired outcome. We offer our assistance to the committee in finding ways to make critical habitat designations more effective, and to get our most imperiled species the protections they need as quickly as possible so that they can be quickly recovered to healthy and sustainable levels.

Thank you.

QUESTIONS SUBMITTED FOR THE RECORD BY CHAIRMAN ROB BISHOP TO DR. LOYAL MEHRHOFF, ENDANGERED SPECIES RECOVERY DIRECTOR AT THE CENTER FOR BIOLOGICAL DIVERSITY

Question 1. You stated in the hearing that these rules maintain the status quo regarding designation of critical habitat. If that is the case, then why was this rulemaking conducted or necessary? Should the regulated public truly expect no change in practice, outcome, or project requirements to arise in future consultations? If not, what are the types of situations in which these rules would impose new or

[19] 81 Fed. Reg. 7226–7248 (Jan. 11, 2016), available at https://federalregister.gov/a/2016-02677.

[20] 178 Fed. Reg. 53058 (Aug. 28, 2013).

[21] Office of Management and Budget, Circular A-4 (Sept. 17, 2003), available at https://www.whitehouse.gov/omb/circulars_a004_a-4/.

additional requirements on entities engaged in section 7 consultations that would differ from what those entities are accustomed to seeing?

Answer. Thank you for your written question to me regarding the new regulation defining "destruction or adverse modification" of critical habitat. As stated in both my written and oral testimony, the Center believes that this rule will likely maintain the status quo regarding consultations. While this rule is too recent to know for sure exactly what will happen in future consultations, here are some additional points of information to help explain our position.

First, throughout this rulemaking process, the Services have asserted that the rule maintains their existing consultation practices. For example, on May 9, 2015—the day that the regulation was proposed and opened for public comment—Gary Frazer, the Assistant Director of the Endangered Species at the Fish and Wildlife Service stated to the press that, "The reality is, this definition, in our view, is unlikely to be any more or less protective."[1] In their view, the rule merely codified existing internal guidance on consultations that was issued in 2004 and 2005. Furthermore, the preamble of the proposed rule did not change key aspects of how consultations are conducted following the Services' Joint Consultation Handbook.[2]

Second, the final rule itself states that the new definition does not change the status quo. For example, the preamble states: "We do not expect this final rule to alter the section 7(a)(2) consultation process from our current practice, and previously completed biological opinions do not need to be re-evaluated in light of this rule."[3] They also state: "Because the final regulatory definition largely formalizes existing guidance that FWS and NMFS have implemented since 2004 and 2005, respectively, we conclude that the section 7(a)(2) consultation process will not significantly change."[4]

Based upon my own personal experience with section 7 consultations, I also feel that this new rule maintains the status quo and does not alter the way consultations are currently supposed to be conducted; nor does it make the process more or less protective of listed species. However, what this rule may, and should, do is make the consultation process more consistent across the agency. As an example, the rule provides some updates to the outdated Consultation Handbook and should make it easier for new employees or consulting agencies to more quickly understand how to conduct or participate in consultations.

Although for different reasons than you, we too were disappointed with the Services' final rule. As noted in my written testimony, the Services' definition of "destruction or adverse modification" is insufficient, as it fails to give independent meaning to this standard as compared to the prohibitions under the jeopardy standard. Section 7 of the Act prohibits Federal agencies from taking actions that jeopardize the continued existence of listed species or result in destruction or adverse modification of critical habitat. Where Congress uses the word "or" it is generally accepted that phrases on either side of the "or" have independent meaning.[5] In the final rule, the prohibition on "destruction or adverse modification" of critical habitat and the prohibition on jeopardy are not adequately differentiated. Specifically, the rule defines "destruction or adverse modification" to apply only to an action that "affects the value of the critical habitat as a whole for the conservation of a listed species."[6] The reality is that where such activities reach this high threshold, a species will almost always be jeopardized as well. Again, in our view, the intent of the Act was to have two somewhat independent standards; with a habitat-specific "adverse modification" standard using a different and lower threshold for being triggered. A recent study from Defenders of Wildlife showed that of more than 80,000 biological opinions completed over the past 8 years, only one resulted in a jeopardy finding, and none resulted in a finding of "destruction or adverse modification" of

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[1] http://www.eenews.net/greenwire/stories/1059999335.

[2] *See* U.S. Fish and Wildlife Service and National Marine Fisheries Service. 1998. *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act* at xiii.

[3] *Definition of Destruction or Adverse Modification of Critical Habitat*, 81 Fed. Reg. 7214 at 7216 (Feb. 11, 2016).

[4] *Id*. at 7223.

[5] *Howell-Robinson v. Albert*, 384 B.R. 19, 21 (D.D.C. 2008) (A statute's words are to be interpreted according to their ordinary sense and with the meaning commonly attributed to them).

[6] 80 Fed. Reg. 7214, 7218 (Feb. 11, 2016), available at https://federalregister.gov/a/2016-02675.

critical habitat.[7] My personal experience with consultations reaching "jeopardy" or "adverse modification" has been similar.

Thank you for having me participate in the hearing and please let me know if you have additional follow up questions to this response.

Mrs. LUMMIS. Thank you, Dr. Mehrhoff.

I now recognize Ms. LeValley for 5 minutes.

STATEMENT OF ROBBIE LEVALLEY, ADMINISTRATOR, DELTA COUNTY, DELTA, COLORADO; FORMER PRESIDENT, COLORADO CATTLEMEN'S ASSOCIATION

Ms. LEVALLEY. Thank you, members of the committee. My name is Robbie LeValley. I am a cow-calf producer from western Colorado, and have been so for four generations. I currently serve as the Chairman of the National Cattlemen's Beef Association Federal Lands Committee, as well.

My testimony will be specific to the Gunnison sage-grouse, which was listed as threatened under the Endangered Species Act in 2014. Our ranch has made the habitat for the Gunnison sage-grouse a priority since 1995, when we worked in cooperation with the Bureau of Land Management and the Colorado Parks and Wildlife to not only have our public land, our BLM land, but our private land have the priority for the Gunnison sage-grouse.

We have two conservation easements on our private ground, and we have enrolled over 1,300 acres of our private ground in habitat for the Gunnison sage-grouse in the Canada Conservation Agreement with assurances. We are well versed in the critical habitat, and we maintain that habitat for the Gunnison sage-grouse.

Our BLM grazing and our private land is a high desert ecological site. Today we have put in over 17 miles of pipe, 14 of it which resides on public land, not only to provide water to the wildlife and to the Gunnison sage-grouse, but our livestock, as well.

The source of that water is our private ground. The water that we provide to the Gunnison sage-grouse originates on our private ground and goes across public land. We maintain the pipe and keep the waters going for the Gunnison sage-grouse. Our managed grazing consistently yields the habitat that exceeds the sage-grouse guidelines. We do that through a deferred rotation and through, again, managing our public and our private land in concert.

We have worked cooperatively with the U.S. Fish and Wildlife Service, the local Audubon group, the BLM, and the Colorado Parks and Wildlife for two decades to benefit the Gunnison sage-grouse. The recently issued rule to implement changes to the regulations for designating critical habitat does cause us some concern. We have been managing for the Gunnison sage-grouse, because it has the broadly expanded power to classify even larger areas of unoccupied range as critical habitat based solely on the evidence of physical and biological features.

The reason for the significant concern is because we have the certainty that we have endured with the BLM for the past two

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[7] *See* Malcom, J.W. and Y-W. Li, 2015. *Data contradict common perceptions about a controversial provision of the U.S. Endangered Species Act*, Proceedings of the National Academy of Sciences 112:(52) 15844-1584, doi:10.1073/pnas.1516938112.

decades; but now that the species is listed as threatened, then the BLM and those giving direction to the BLM are asking us to change our livestock grazing. That is why the concern of not only what we are currently experiencing, but why the expanse of the critical habitat causes us concern.

Again, we are seeing areas that should be completely avoided, even though, in the past, under the management, when we have been working cooperatively together, we have exceeded the sage-grouse guidelines. And now this regulatory uncertainty is maybe even larger.

Livestock grazing was not even listed in the top listing factors for the Gunnison sage-grouse, and yet we see this being applied inappropriately, almost always reducing the time that the livestock are to be on the allotment, the season, our reduced numbers in the AUM, or a combination of both.

Our fear is that the over-regulation of a necessary tool, like grazing, has nothing to do with grazing itself, but instead is due to the lack of other viable regulatory targets. Finding it is impossible to regulate recreation, wildfire, drought, and invasive weeds, grazing becomes the primary casualty of the over-reach into effective ongoing state management of wildlife.

Because we are a permitted and regulated industry should not mean that we are the regulated industry of choice or by de facto.

Another issue of concern is the revised definition of "destruction," or "adverse modification," which can be triggered if a permitted use significantly delays the development of features needed by the species. There is only one multiple use that will be the target for the delay of development, and that will be livestock grazing.

A current example of this is unfolding with the listed bull trout, where the grazing is providing for proper functioning condition. However, the litigants continue to say that because of adverse delay, that livestock grazing should be removed.

The U.S. Fish and Wildlife Service consistently and correctly says that grazing is necessary and critical for the conservation of species and maintenance of essential habitat. However, what we see in this modification definition stands in contrast to the assertion by allowing for even more opportunity for abusive litigation and significant delay in Section 7 consultation.

In closing, Federal agencies must move away from the scientifically inaccurate idea that removing, reducing, and retiring grazing is the answer to every problem that faces the agencies and species in critical habitat.

We look forward to working with this committee, the Fish and Wildlife Service, and all other partners involved.

[The prepared statement of Ms. LeValley follows:]

PREPARED STATEMENT OF ROBBIE LEVALLEY, ADMINISTRATOR, DELTA COUNTY, COLORADO AND FEDERAL LANDS CHAIR, NATIONAL CATTLEMEN'S BEEF ASSOCIATION

Mr. Chairman, Ranking Member Grijalva, and members of the subcommittee, my name is Robbie LeValley. I am a fourth generation cattle producer and my family and I run a cow-calf operation in Hotchkiss, Colorado. In addition to ranching, my family and I are part owners of Homestead Meats, a direct beef marketing business and USDA processing plant. I currently serve as chairman of the National Cattlemen's Beef Association's Federal Lands Committee and as a director for the Colorado Public Lands Council. It is my pleasure to testify before your committee

to discuss the impact this Administration's critical habitat policy has on ranchers across the West.

For generations, ranchers have served as stewards of the land. Land and habitat thrives because of the knowledge and resources that we put into our land and grazing management decisions. My operation, and the operations of other ranchers proves that managed grazing not only provides for livestock, but for wildlife as well. The time and money that ranchers invest into public land improves water sources, controls invasive species, and removes the fine fuel loads that contribute to catastrophic wildfires that destroy habitat and food sources for wildlife.

My testimony will be specific to the Gunnison Sage Grouse which was listed as a threatened under the Endangered Species Act in 2014. Our ranch has made the habitat for the Gunnison Sage Grouse (GSG) a priority since 1995, when we became involved with the Colorado Parks and Wildlife and Bureau of Land Management (BLM) to cooperate in providing habitat on our private land and BLM allotments. We have two conservation easements on our private ground and have enrolled an additional 1,300 acres of private ground in a Candidate Conservation Agreement with Assurances (CCAA) strictly for the grouse.

Our BLM grazing allotments are a high desert ecological site. To date, we have put in over 17 miles of pipe—14 of which resides on public land—to not only provide water for our cows but supply waterers for the GSG as well as other wildlife species. The source of this water for the GSG is from our private land and we maintain the pipe infrastructure on both the public and private lands to ensure delivery of this water. In addition, we manage our grazing each year to provide nesting, brood rearing and summer habitat. Our managed grazing consistently yields habitat that exceeds GSG guidelines set by the USFWS and BLM. We have worked cooperatively with the USFWS, the local Audubon group, BLM, and CPW for two decades to benefit the Gunnison Sage Grouse and our efforts are yielding quality grouse habitat.

The U.S. Fish and Wildlife Service recently issued a final rule to implement changes to the regulations for designating critical habitat under the Endangered Species Act. The Service stated that the rule was "intended to add clarity for the public, clarify expectations regarding critical habitat and provide for a credible, predictable, and simplified critical habitat designation process." In reality, the rule goes beyond mere clarifications and simplification of the process and instead attempts a broad re-orientation of the scope and purpose of critical habitat designations.

Under the revised rules, the Service will have broadly expanded power to classify large areas of unoccupied range as critical habitat based solely on evidence of the "physical and biological features" needed to support a species. Worse, the new rules also provide the ability to designate critical habitat based on a site's *potential* to support those physical or biological features, even if they do not exist at the time of the designation. In essence, this broad latitude brings every single acre of a species' range into the crosshairs of a critical habitat designation.

The ability to plan is essential in any business, and in our business—where we are managing both our herd and the landscape—this action by the Service could be catastrophic. As adopted, these changes increase the discretion of the Service to broadly designate areas as critical habitat—or be forced to do so through litigation abuse by predatory environmental groups, which will impose strict requirements and modifications on public land livestock grazing at a time of unprecedented, effective coordination between ranchers and conservationists to create and protect GSG habitat.

Derailing these successful ongoing conservation efforts and undermining the regulatory certainty needed to execute highly technical business operations like rotational grazing from year-to-year will seriously disrupt our business as well as the habitat improvements we've made on the ground. Introduction of new Federal regulations into an ongoing collaborative effort should not be undertaken lightly, and must be done in a manner that is consistent with conservation efforts that are already working. Unfortunately, this is not the case with the new critical habitat guidelines, which propose a series of definitions that step outside the bounds of the statute, but are also so vague that they are ineffective in implementation.

Additionally, USFWS has directed BLM to standardize language in Resource Management Plans (RMPs) on occupied and critical habitat for habitat guidelines across entire landscapes, which is simply not biologically possible given the ecological site descriptions, year-to-year temperature and moisture fluctuations, and diversity of vegetation on the landscape. Variations on the landscape and seasonal fluctuations in habitat require intensive day-to-day management, which only an empowered permittee with extensive knowledge of site-specific conditions can achieve. This management becomes especially problematic in the context of a one-size-fits-all regulatory scheme as proposed. The end result of this regulatory expansion is

a classic Federal over-reach with the potential to greatly reduce the grazing footprint and decrease the active management of herbivory.

Ranching is a technical business that operates on a year round planning cycle. Regulatory certainty is absolutely essential to effective partnerships between land management agencies like USFWS and BLM and ranchers. The broad generalizations and definitions in the proposed critical habitat guidelines do not provide this. Specific to the Gunnison Sage Grouse, livestock grazing was not listed in the top listing factors, yet it continues to be a management tool that BLM applies inappropriately—almost always resulting in reduced time that livestock can be on an allotment, reduced numbers or AUMs, or a combination of both. Our fear is that this over-regulation of a necessary biological partner like grazing has nothing to do with grazing itself and instead is due to the lack of other viable regulatory targets. Finding it impossible to regulate wildfire, drought, or invasive weeds, grazing becomes the primary casualty of Federal over-reach into effective ongoing state management of wildlife.

Another issue of concern is the revised definition of "destruction or adverse modification"—which can be triggered if a permitted use such as livestock grazing significantly delays the development of features needed by the species, a standard that is almost impossible to define or measure. Implementation of this language will create yet another vast opportunity for abuse by litigious environmental organizations that seek to eliminate multiple use on Federal lands.

Again, there is only one multiple use that will take the hit for this "delay in development"—proper livestock grazing. An example of this is currently unfolding in regard to the listed bull trout where environmental litigants are arguing that continued grazing while maintaining the current conditions of the range and riparian areas that are classified as being in "properly functioning condition" is still adverse modification of critical habitat because the Forest Service cannot demonstrate that the range will move to an "ecologically ideal level" over time. The litigants are focusing on temperature and believe there is adverse modification of critical habitat if the warmer streams found throughout the West in August are not converted to cold streams at that time. The FWS' new rule will support the litigants' arguments regarding modification of critical habitat in most grazing allotments throughout the West.

USFWS consistently and correctly says that grazing is necessary and critical for the conservation of species and maintenance of essential habitat. However, the revised critical habitat rules and adverse modification definition stand in contrast to this assertion by allowing for even more opportunity for abusive litigation and reduction in grazing over time. Additionally, this regulatory expansion exposes public grazing allotments to lengthy delays for ESA Section 7 consultations—yet another source of litigation abuse by environmental activists.

The critical habitat rule states that "lands owned by the Federal Government should be prioritized as sources of support in the recovery of listed species, and that to the extent possible the Services will focus designation of critical habitat on Federal lands in an effort to avoid the regulatory burdens on non-Federal lands." [79 Fed. Reg. at 27056; 25057]. In general, we are supportive of this approach. Nevertheless, the Service must recognize that functional Federal land grazing permits are essential in maintaining a viable ranching community as well as healthy ecosystems. The Services must also consider the potential consequences of increased grazing pressure on private lands that would occur if burdensome grazing restrictions were imposed on the use of adjacent public lands. Appreciation of this interrelationship of private and public lands for ranching is crucial in both minimizing burdens on the regulated community and effectively managing for sensitive species.

In closing, Federal agencies must move away from the scientifically inaccurate idea that removing, reducing and retiring grazing is the answer to every problem the agencies face on public land. As these new standards are implemented, they will have a negative economic impact on ranchers and rural communities without benefiting habitat and the species that live there. Imposing regulatory change on grazing without any scientific basis is unwarranted and makes it clear that this Administration's intent is to manage away from productive uses, rather than actually protecting species and their habitat.

The livestock industry not only plays an integral role in the safekeeping of our Federal lands but also in the maintenance of the critical habitat for the species on that land. We look forward to working with the committee to ensure that America's ranchers continue to have the ability to protect and restore natural habitat while grazing at the same time—without having to spend countless hours and thousands of dollars to defend a practice that has been jointly occurring with species, to the benefit of those species, for centuries. I appreciate the opportunity to be here today

and I am happy to take any questions the committee members may have. Thank you.

Mrs. LUMMIS. Thank you, Ms. LeValley.

And, Ms. Budd-Falen, you are recognized for 5 minutes.

STATEMENT OF KAREN BUDD-FALEN, SENIOR PARTNER, BUDD-FALEN LAW OFFICES, LLC, CHEYENNE, WYOMING

Ms. BUDD-FALEN. Thank you, Congresswoman Lummis, Ranking Member Grijalva, and honorable committee members. I appreciate the opportunity to be here.

My name is Karen Budd-Falen. Not only am I an attorney, I am a fifth-generation rancher who now has an ownership interest to make sure that that ranch continues in our family for a sixth generation. We raise a cow-calf operation there, and no one cares more about that land than we do, because without that land we would not continue to the next generation.

The Honorable Dan Ashe talked about how many species this Administration has delisted, and I would certainly thank them for that; but I would also note that they have also listed more species on the endangered species list than any other administration. Today there are 2,285 plant and animal species listed as threatened or endangered, 1,592 of which are located in the United States. Although critical habitat is supposed to be designated within 1 year of listing, only 791 of those species have designated critical habitat.

Even with that backlog in critical habitat designation, new listing petitions, candidate species determinations, and proposed listings are looming. According to the Fish and Wildlife Service data, 1,508 species are still pending review for listing. For every species listed, new critical habitat will have to be considered.

Although the ESA has not seen major regulatory change between 2012 and 2016, this Administration finalized four new regulations and two new policies that I believe substantially increase the amount of critical habitat designation and the amount of management that is going to occur. While I am happy to discuss those regulations individually, I think that, overall, you have three major problems.

First, these regulations were all developed in a piecemeal fashion: one regulation here, one regulation there, one draft here, another draft there. And each of those drafts did include a NEPA analysis. The problem is that none of those NEPA analyses were ever cumulatively considered. So there has never been a cumulative impacts analysis on four new regulations and two new policies, all of which implicate critical habitat. I would argue that that is a violation of the National Environmental Policy Act.

The whole purpose of NEPA is to give the public and decisionmakers a chance to cumulatively look at their decisions and to offer effective comments. I believe there was no way for the public to argue and offer those effective comments when things were dribbled out piece by piece, and no one has read them all together.

Everyone got sort of excited when the new regulations came out in February 2016, but you have to look at what came out before

and add them all together to truly understand the impact of the new critical habitat arguments.

Additionally, I would argue that the new regulations violate the Administrative Procedures Act. Again, I think it is a matter of transparency to the public. If the public does not have the opportunity to look at everything as a package and understand it all together, the public simply cannot make informed public comment, and this Congress cannot offer informed public comment. I think that is one of the fallacies with the regulation. I think that is one of the problems with piecemeal offering of regulations and new policies that substantially change what has gone on before.

Second, the National Environmental Policy Act requires a consideration not only of just the environmental impacts, but also of the community custom and culture and the economic impacts. Without adding all of these regulations together, there is simply no way that that occurred; so we really do not have any idea what the economic impact of these new regulations are going to be, or what the impacts are going to be on small, local governments, private landowners, or citizens throughout the country.

Finally, I believe that these new regulations do not follow the Endangered Species Act itself. Congress and the Endangered Species Act use the word "critical" for a reason. It did not say "Designate habitat," it said, "Designate habitat that is critical and must be managed." And I think these new regulations eliminate that distinction between habitat and critical habitat and are a violation of the Endangered Species Act.

With that, I would stand for questions. Thank you.

[The prepared statement of Ms. Budd-Falen follows:]

PREPARED STATEMENT OF KAREN BUDD-FALEN, SENIOR PARTNER, BUDD-FALEN LAW OFFICES, LLC, CHEYENNE, WYOMING

My name is Karen Budd-Falen. I grew up as a fifth generation rancher and have an ownership interest in a family owned ranch west of Big Piney, Wyoming. I am also an attorney emphasizing private property and environmental litigation (including the Endangered Species Act). I represent the citizens, local businesses, private property owners and rural counties and communities who will bear the brunt of these new critical habitat regulations and the significant litigation costs that will follow.

The U.S. Fish and Wildlife Service ("FWS") characterizes the purpose of the Endangered Species Act ("ESA") "to protect and recover imperiled species and the ecosystems upon which they depend." According to the FWS Web site, last visited on April 4, 2016, there are a total of 2258 plant and animal species on the threatened or endangered species list. Specifically there are 898 U.S. plants, 694 U.S. animals, 3 foreign plants and 663 foreign animals on the list. Of these, only 791 currently have designated critical habitat. There are also 59 species on the "candidate species" list; 72 more species proposed to be listed; and 1377 species that have been petitioned for listing, uplisting or critical habitat designation and the petition is under review. On the pending petitions, the Center for Biological Diversity ("CBD") is responsible for filing 44 of them including 583 species; WildEarth Guardians ("WEG") is responsible for filing 32 petitions including 716 species, and other environmental groups such as the Defenders of Wildlife, Natural Resources Defense Council, Friends of Animals and others have filed 31 petitions including 44 species. Although the mega-species settlement agreement of July 12, 2011 was supposed to curb listing petitions to allow the FWS to catch-up on its backlog, just since the mega-species settlement agreement was signed, 65 new listing petitions have been filed including 135 species. Since the mega species settlement agreement was signed on July 12, 2011, the CBD has filed 24 listing petitions including 92 species, and the WEG has filed 12 listing petitions including 13 species.

Although the language of the ESA has not significantly changed since 1979, the totality of the new regulatory mandates for critical habitat designation and management has significantly expanded the FWS's jurisdiction over private property. While many Members of Congress and private property owners were vehemently protesting the Environmental Protection Agency's expansion of jurisdiction under the Clean Water Act with the "Ditch Rule," the FWS and NOAA-Fisheries (collectively "FWS") were bit-by-bit expanding the Federal Government's over-reach on private property rights and Federal land uses through the new critical habitat and "adverse modification" regulations. This expansion is embodied in the release of four separate final rules and two final policies that the FWS admits will result in listing more species and expanding designated critical habitat. According to the FWS, all of these new requirements conform to President Obama's Executive Order 13563, "Improving Regulation and Regulatory Review."

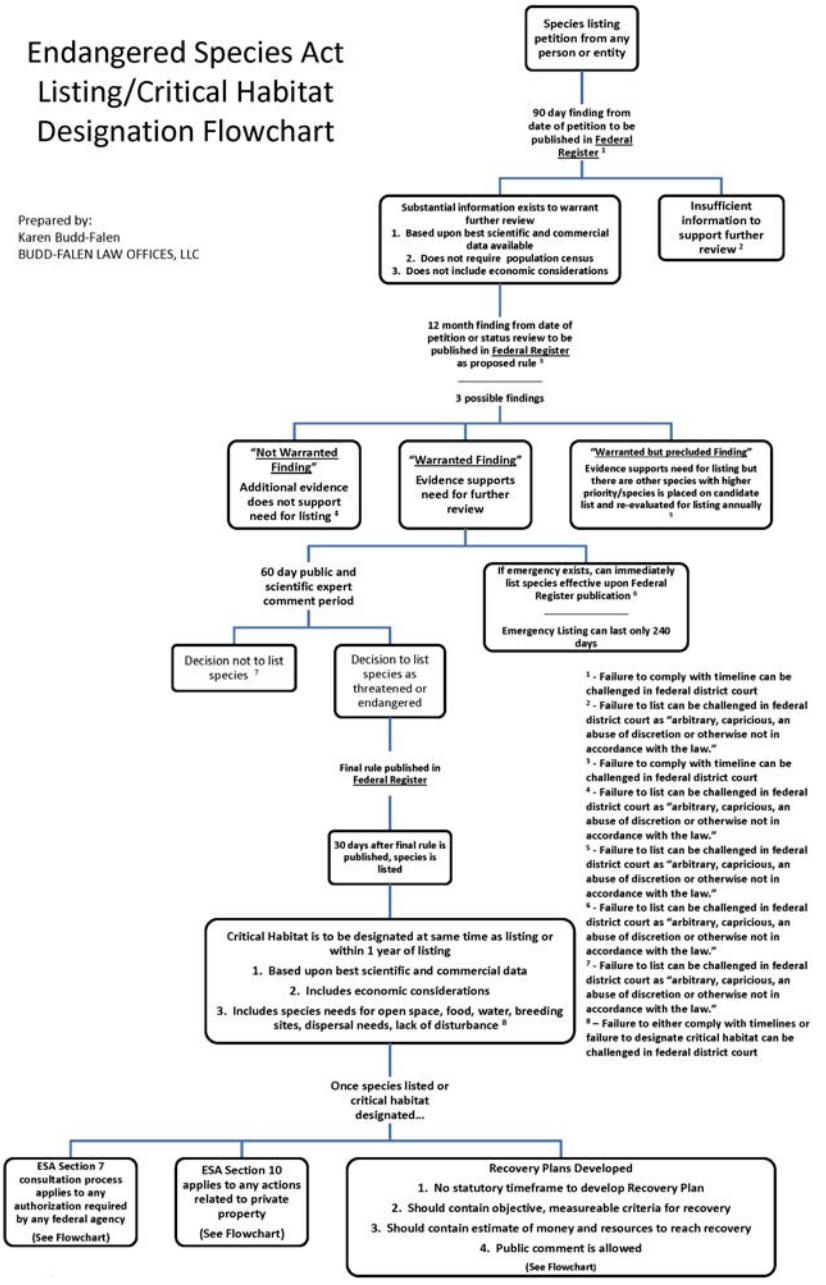
I. OVERVIEW OF THE ENDANGERED SPECIES ACT PRE-2012, 2013, 2014, 2015 AND 2016 REGULATIONS

The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted." *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978). The goal of the Act is "to provide for the conservation, protection, restoration, and propagation of species of fish, wildlife, and plants facing extinction." *Wyoming Farm Bureau Federation v. Babbitt*, 199 F.3d 1224, 1231 (10th Cir. 2000), *citing* S. Rep. No. 93–307, at 1 (1973) *and* 16 U.S.C. § 1531(b). Under the ESA, a threatened species means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant part of its range, *see* 16 U.S.C. § 1532 (20), and an endangered species means any species which is in danger of extinction throughout all or a significant portion of its range other than insects that constitute a pest whose protection would present an overwhelming and over-riding risk to man. 16 U.S.C. § 1532(6).

Anyone can petition the FWS or NOAA to have a species listed as threatened or endangered. 16 U.S.C. § 1533. Listing decisions are to be based on the "best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). However, there is no requirement that the Federal Government actually count the species populations prior to listing. There are no economic considerations included as part of the listing of a threatened or endangered species.

The listing process is also based on very specific time frames as set forth in the Act. If the FWS fails to meet any of these time frames, litigation can occur. *See* Exhibit 1. In the listing and critical habitat designation process, there are eight different points at which Federal court litigation can be filed.

Exhibit 1


Endangered Species Act Listing/Critical Habitat Designation Flowchart
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Species listing petition from any person or entity
90 day finding from date of petition to be published in Federal Register [1]
Substantial information exists to warrant further review
1. Based upon best scientific and commercial data available
2. Does not require population census
3. Does not include economic considerations
Insufficient information to support further review [2]
12 month finding from date of petition or status review to be published in Federal Register as proposed rule [3]
3 possible findings
"Not Warranted Finding"
Additional evidence does not support need for listing [4]
"Warranted Finding"
Evidence supports need for further review
"Warranted but precluded Finding"
Evidence supports need for listing but there are other species with higher priority/species is placed on candidate list and re-evaluated for listing annually [5]
60 day public and scientific expert comment period
If emergency exists, can immediately list species effective upon Federal Register publication [6]
Emergency Listing can last only 240 days
Decision not to list species [7]
Decision to list species as threatened or endangered
Final rule published in Federal Register
30 days after final rule is published, species is listed
Critical Habitat is to be designated at same time as listing or within 1 year of listing
1. Based upon best scientific and commercial data
2. Includes economic considerations
3. Includes species needs for open space, food, water, breeding sites, dispersal needs, lack of disturbance [8]
Once species listed or critical habitat designated...
ESA Section 7 consultation process applies to any authorization required by any federal agency
(See Flowchart)
ESA Section 10 applies to any actions related to private property
(See Flowchart)
Recovery Plans Developed
1. No statutory timeframe to develop Recovery Plan
2. Should contain objective, measureable criteria for recovery
3. Should contain estimate of money and resources to reach recovery
4. Public comment is allowed
(See Flowchart)
[1] - Failure to comply with timeline can be challenged in federal district court
[2] - Failure to list can be challenged in federal district court as "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law."
[3] - Failure to comply with timeline can be challenged in federal district court
[4] - Failure to list can be challenged in federal district court as "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law."
[5] - Failure to list can be challenged in federal district court as "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law."
[6] - Failure to list can be challenged in federal district court as "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law."
[7] - Failure to list can be challenged in federal district court as "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law."
[8] – Failure to either comply with timelines or failure to designate critical habitat can be challenged in federal district court

Once a species is listed as threatened or endangered, prohibitions against "take" apply. 16 U.S.C. § 1540. "Take" means to harass, harm, pursue, hunt, shoot, wound, kill, capture, or collect, or attempt to engage in such conduct. 16 U.S.C. § 1532(19). "Harm" within the definition of "take" means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing breeding, sheltering or feeding. 50 C.F.R. § 17.3. Harass in the definition of "take" means intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering. 50 C.F.R. § 17.3. "Take" may include critical habitat modification. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). If convicted of "take," a person can be liable for civil penalties of $10,000 per day and possible prison time. 16 U.S.C. § 1540(a), (b).

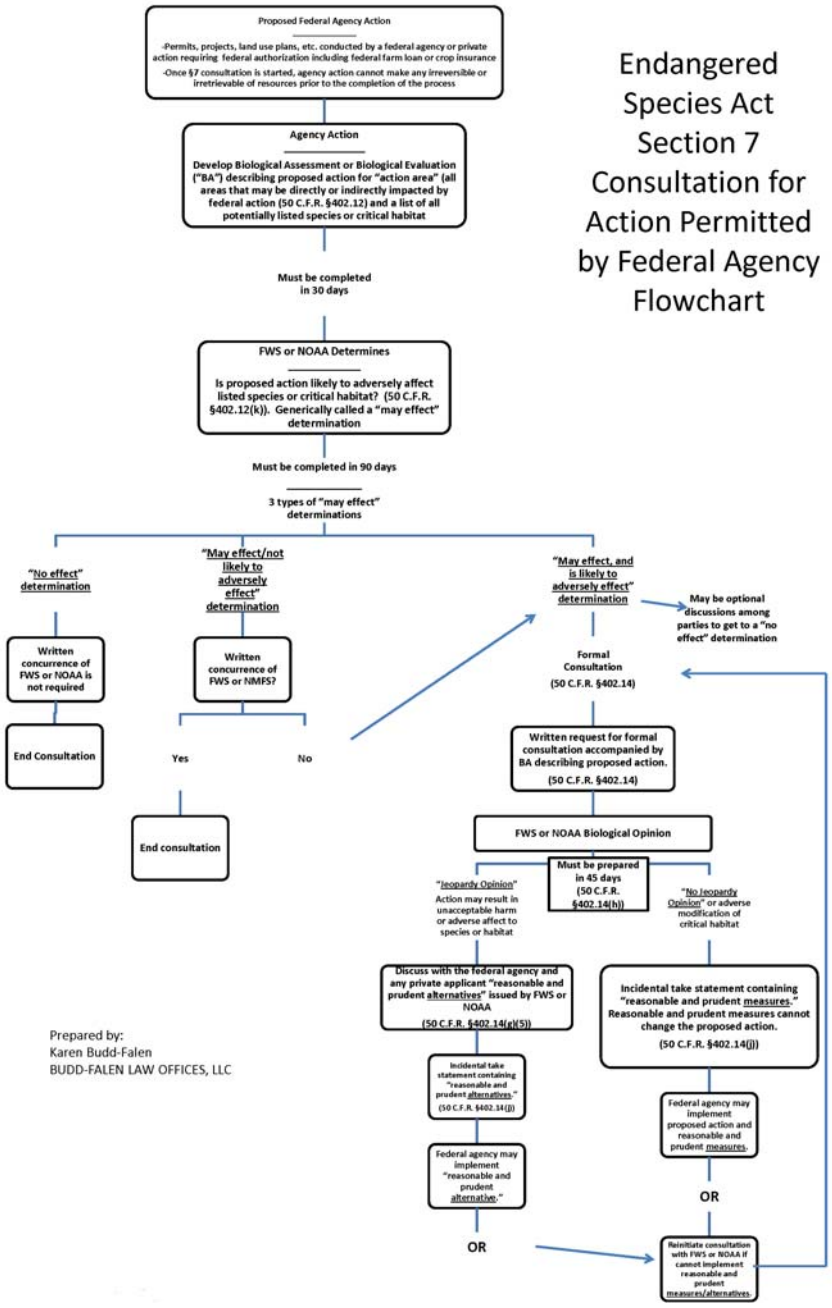
Once a species is listed as threatened or endangered, the FWS or NOAA must "to the maximum extent prudent and determinable," concurrently with making a listing determination, designate any habitat of such species to be critical habitat. *Id*. at § 1533(a)(3). By definition, critical habitat ("CH") are "specific areas" *see* 16 U.S.C. § 1532(5)(A) and must be "defined by specific limits using reference points and lines found on standard topographic maps of the area." 50 C.F.R. § 424.12(c); *see also* § 424.16 (CH must be delineated on a map). For "specific areas within the geographical area occupied by the [listed] species," the FWS may designate CH, provided such habitat includes the species' "primary constituent elements ("PCEs") which are the (1) "physical or biological features;" (2) that are "essential to the conservation of the species;" and (3) "which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(I); 50 C.F.R. § 424.12(b).

CH must also be designated on the basis of the best scientific data available, 16 U.S.C. § 1533(b)(2), after the FWS considers all economic and other impacts of proposed CH designation. *New Mexico Cattle Growers Assoc. v. United States Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001) (specifically rejecting the "baseline" approach to economic analyses) *but see Arizona Cattle Growers Association v. Salazar*, 606 F.3d 1160 (9th Cir. 2010) (adopting the baseline or incremental impacts approach). CH may not be designated when information sufficient to perform the required analysis of the impacts of the designation is lacking. 50 C.F.R. § 424.12(a)(2). The FWS may exclude any area from CH if it determines that the benefits of such exclusion outweigh the benefits, unless it determines that the failure to designate such area as CH will result in extinction of the species concerned. 16 U.S.C. § 1533(b)(2). This is called the "exclusion analysis."

Once a species is listed, for actions with a Federal nexus, ESA section 7 consultation applies. Section 7 of the ESA provides that "[e]ach Federal agency [must] in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical . . . ." 16 U.S.C. § 1536(a)(2). The first step in the consultation process is to name the listed species and identify CH which may be found in the area affected by the proposed action. 50 C.F.R. § 402.12(c–d). If the FWS or NOAA determines that no species or CH exists, the consultation is complete, otherwise, the FWS must approve the species or habitat list. *Id*. Once the list is approved, the action agency must prepare a Biological Assessment or Biological Evaluation ("BA"). *Id*. The contents of the BA are at the discretion of the agency, but must evaluate the potential effects of the action on the listed species and critical habitat and determine whether there are likely to be adverse effects by the proposed action. *Id*. at § 402.12(a, f). In doing so, the action agency must use the best available scientific evidence. 50 C.F.R. § 402.14(d); 16 U.S.C. § 1536(a)(2). Once complete, the action agency submits the BA to the FWS or NOAA. The FWS or NOAA uses the BA to determine whether "formal" consultation is necessary. 50 C.F.R. § 402.12(k). The action agency may also request formal consultation at the same time it submits the BA to the FWS. *Id*. at § 402.12(j–k). During formal consultation, the FWS will use the information included in the BA to review and evaluate the potential effects of the proposed action on the listed species or CH, and to report these findings in its Biological Opinion ("BO"). 50 C.F.R. § 402.14(g–f). Unless extended, the FWS or NOAA must conclude formal consultation within 90 days, and must issue the BO within 45 days. *Id*. at § 402.14(e); 16 U.S.C. § 1536(b)(1)(A).

If the BO concludes that the proposed action will jeopardize any listed species or adversely modify critical habitat, the FWS's BO will take the form of a "jeopardy opinion" and must include any reasonable and prudent alternatives which would avoid this consequence. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h). If the BO contains a jeopardy opinion with no reasonable and prudent alternatives, the action agency cannot lawfully proceed with the proposed action. 16 U.S.C. § 1536(a)(2). If the BO does not include a jeopardy opinion, or if jeopardy can be avoided by reasonable and prudent measures, then the BO must also include an incidental take statement ("ITS"). 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(I). The ITS describes the amount or extent of potential "take" of listed species which will occur from the proposed action, the reasonable and prudent measures which will help avoid this result, and the terms and conditions which the action agency must follow to be in compliance with the ESA. *Id.*; *see Bennett v. Spear*, 520 U.S. 154, 170 (1997). *See* Exhibit 2.

Exhibit 2


Endangered Species Act Section 7 Consultation for Action Permitted by Federal Agency Flowchart
Proposed Federal Agency Action
-Permits, projects, land use plans, etc. conducted by a federal agency or private action requiring federal authorization including federal farm loan or crop insurance
-Once §7 consultation is started, agency action cannot make any irreversible or irretrievable of resources prior to the completion of the process
Agency Action
Develop Biological Assessment or Biological Evaluation ("BA") describing proposed action for "action area" (all areas that may be directly or indirectly impacted by federal action (50 C.F.R. §402.12) and a list of all potentially listed species or critical habitat
Must be completed in 30 days
FWS or NOAA Determines
Is proposed action likely to adversely affect listed species or critical habitat? (50 C.F.R. §402.12(k)). Generically called a "may effect" determination
Must be completed in 90 days
3 types of "may effect" determinations
"No effect" determination
"May effect/not likely to adversely effect" determination
"May effect, and is likely to adversely effect" determination
May be optional discussions among parties to get to a "no effect" determination
Written concurrence of FWS or NOAA is not required
End Consultation
Written concurrence of FWS or NMFS?
Yes
No
End consultation
Formal Consultation (50 C.F.R. §402.14)
Written request for formal consultation accompanied by BA describing proposed action. (50 C.F.R. §402.14)
FWS or NOAA Biological Opinion
Must be prepared in 45 days (50 C.F.R. §402.14(h))
"Jeopardy Opinion" Action may result in unacceptable harm or adverse affect to species or habitat
"No Jeopardy Opinion" or adverse modification of critical habitat
Discuss with the federal agency and any private applicant "reasonable and prudent alternatives" issued by FWS or NOAA (50 C.F.R. §402.14(g)(5))
Incidental take statement containing "reasonable and prudent measures." Reasonable and prudent measures cannot change the proposed action. (50 C.F.R. §402.14(j))
Incidental take statement containing "reasonable and prudent alternatives." (50 C.F.R. §402.14(j))
Federal agency may implement "reasonable and prudent alternative."
OR
Federal agency may implement proposed action and reasonable and prudent measures.
OR
Reinitiate consultation with FWS or NOAA if cannot implement reasonable and prudent measures/alternatives
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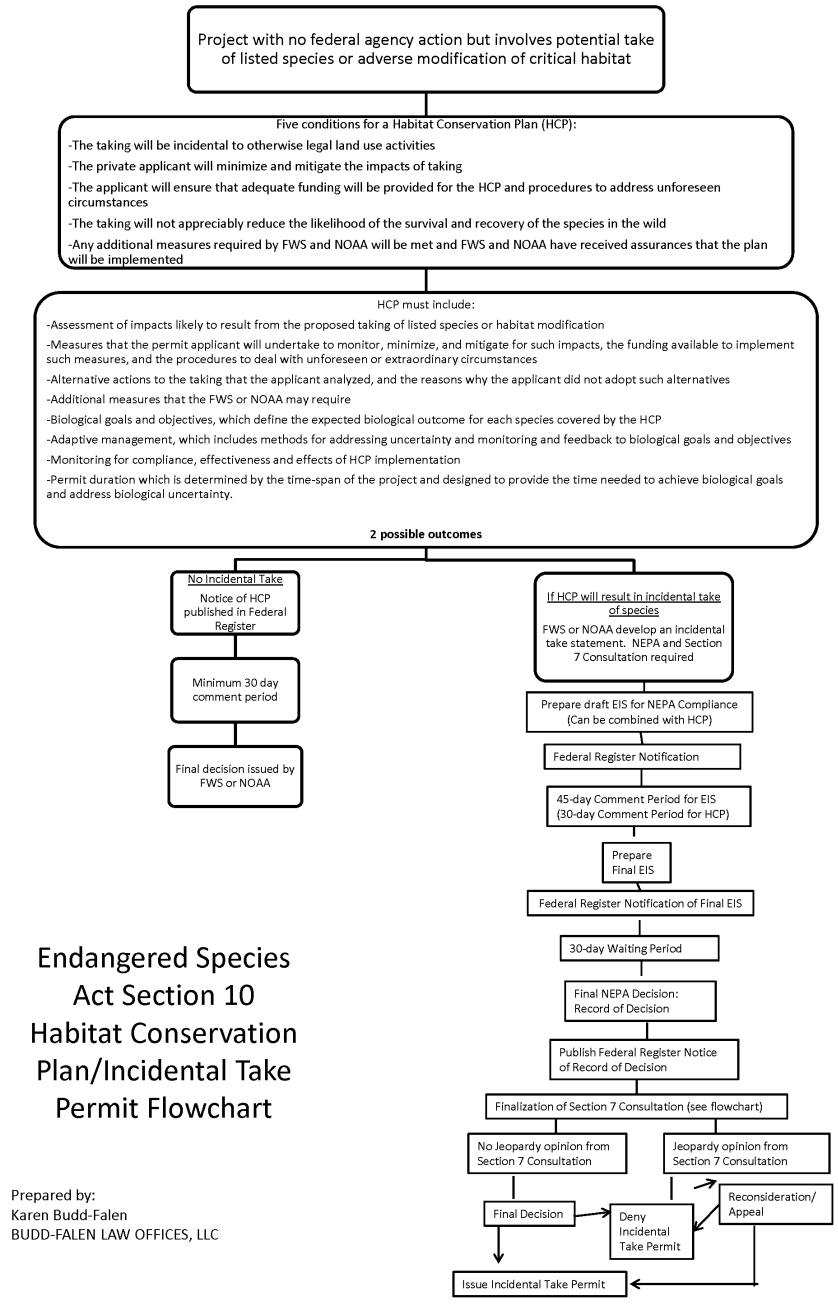
While most private property owners do not think that the activity on their private property has a "Federal nexus" to trigger an ESA section 7 consultation, the courts have held otherwise. For example, the courts require FEMA to complete section 7 consultation prior to providing flood insurance; U.S. Department of Agriculture Farm Service Agency to complete section 7 consultation related to farm conservation measures, issuing farm operating loans and completing nutrient management plans; Bureau of Reclamation when developing flood control plans, and others.

Once a species is listed, ESA section 10 also applies on private land, even if there is no Federal nexus. In order to avoid the penalties for "take" of a species, and still allow the use and development of private land, the ESA also authorizes the FWS to issue ITSs to private landowners upon the fulfillment of certain conditions, specifically the development and implementation of habitat conservation plans ("HCPs"). 16 U.S.C. § 1539. A HCP has to include (a) a description of the proposed action, (b) the impact to the species that will result from the proposed action, (c) the steps that the applicant will take to minimize any negative consequences to the listed species by the proposed action, (d) any alternatives the applicant considered to the proposed action and why those alternatives were rejected, and (e) any other measures that the FWS may deem necessary for the conservation plan. 16 U.S.C. § 1539(a)(2)(A). Once an HCP is presented, the FWS must make certain findings before it can issue an ITS. Those findings include (a) that the taking of the species is incidental to the proposed action, (b) that the proposed action implements a lawful activity, (c) that the applicant, to the maximum extent possible, will minimize and mitigate any negative impacts to the listed species, (d) that the HCP is adequately funded, (e) that the taking will not appreciably reduce the survival and recovery of the species, and (f) any other measures deemed necessary will be carried out. 16 U.S.C. § 1539(a)(2)(B). As a practical matter, mitigation means that the applicant will either fund programs supporting the listed species or will provide or set aside land. *See* Exhibit 3.

Exhibit 3



Endangered Species Act Section 10 Habitat Conservation Plan/Incidental Take Permit Flowchart

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II. CHANGES CAUSED BY THE FOUR NEW REGULATIONS AND TWO NEW POLICIES PROMULGATED IN 2012, 2013, 2014, 2015 AND 2016

As stated above, according to the FWS, the new critical habitat regulations were adopted to comply with President Obama's Executive Order 13563, "Improving Regulation and Regulatory Review" ("E.O. 13563"). That Executive Order, signed on January 18, 2011, "supplement[s] and reaffirm[s]" the requirements of Executive Order 12866 dated September 30, 1993. That E.O. stated that:

> each agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

Based upon the principals in the Obama Executive Order, each Federal agency was to present a list of proposed regulatory reforms to the Office of Information and Regulatory Affairs within 120 days of the signing of E.O. 13563.

While the FWS and NOAA may have complied with the 120 day requirement in the Executive Order, I do not believe that the rest of the Order presented any guidance to the regulatory changes in critical habitat designation and management.

First, the FWS and NOAA issued *four* new regulations and *two* new policies in the space of 4¼ years. These new regulations all concern the same subject: critical habitat designations. These new regulations were issued as draft rules at different times, making it extremely difficult for the public to understand the regulatory changes in their totality. Certainly issuing rules and policies in a piecemeal fashion cannot be said to provide adequate public notice and understanding of the working of the FWS and NOAA in implementing the ESA. In fact Executive Order 13563 directs the FWS and NOAA to consider the costs of the "cumulative regulations," *see* (2), but this cumulative cost of four new regulations and two new policies has not been assessed. The E.O. also commands the agencies to "tailor its regulations to impose the least burden on society," *id*., and "to the maximum extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt." *Id*. (5). As described below, I do not believe that any of these requirements have been—or can be—met.

Starting with a new 2012 rule and extending to the 2015 rules and policy, designation of critical habitat, including the amount of both private land and Federal land that will be included as, and managed for, critical habitat have changed, and the FWS has admitted that the new rules will result in more land and water being included in critical habitat designations. The first major change is the inclusion of "the principals of conservation biology" as part of the "best scientific and commercial data available." Conservation biology was not created until the 1980s and has been described by some scientists as "agenda-driven" or "goal-oriented" biology. *See* Final Rule, Implementing Changes to the Regulations for Designating Critical Habitat, February 11, 2016.

Second, the new Obama policy has changed regarding a listing species "throughout a significant portion of its range." Now rather than listing species within the range where the problem lies, *all species throughout the entire range* will be listed as threatened or endangered. *See* Final Policy, Interpretation of the Phrase "Significant Portion of its Range," July 1, 2014.

Third, based upon the principals of conservation biology, including indirect or circumstantial information, critical habitat designations will be greatly expanded. Under the new regulations, the FWS will initially consider designation of both occupied and unoccupied habitat, including habitat with POTENTIAL PCEs. In other words, not only is the FWS considering habitat that is or may be used by the species, the FWS will consider habitat that may develop PCEs sometime in the future. There is no time limit on when such future development of PCEs will occur, or what types of events have to occur so that the habitat will develop PCEs. The FWS can also look outside occupied and unoccupied habitat to decide if the potential habitat

will develop PCEs in the future and should be designated as critical habitat now. The FWS has determined that *critical habitat can include temporary or periodic habitat, ephemeral habitat, potential habitat and migratory habitat, even if that habitat is currently unusable by the species*. *See* Final Rule, Implementing Changes to Regulations for Designating Critical Habitat, February 11, 2016.

Fourth the FWS has also determined that it will no longer publish the text or legal descriptions or GIS coordinates for critical habitat, rather it will only publish maps of the critical habitat designation. Given the small size of the Federal Register, I do not think this will adequately notify landowners whether their private property is included or excluded from a critical habitat designation. *See* Final Rule, "Revised Implementing Regulations for Requirements to Publish Textual Description of Boundaries of Critical Habitat," May 1, 2012.

Fifth, the FWS has significantly limited what economic impacts are considered as part of the critical habitat designation. According to a Tenth Circuit Court of Appeals decision, although the economic impacts are not to be considered as part of the listing process, once a species was listed, if the FWS could not determine whether the economic impact came from listing OR critical habitat, the cost should be included in the economic analysis. In other words, only those costs that were solely based on listing were excluded from the economic analysis. In contrast, the Ninth Circuit Court took the opposite view and determined that only economic costs that were SOLELY attributable to critical habitat designations were to be included. Rather than requesting the U.S. Supreme Court make a consistent ruling among the courts, the FWS simply recognized this circuit split for almost 15 years. However, on August 28, 2013, the FWS issued a final rule that determined that the Ninth Circuit Court was "correct," and regulatorily determined that ONLY economic costs attributable SOLELY to the critical habitat designation would be analyzed. This rule substantially reduces the determination of the cost of critical habitat designation because the FWS can claim that almost all costs are based on the listing of the species because if not for the listing, there would be no need for critical habitat. *See* Final Rule, Revisions to the Regulations for Impact Analysis of Critical Habitat, August 28, 2013.

Sixth, the FWS has determined that while *completing* the economic analysis is mandatory, the *consideration* of whether habitat should be excluded based on economic considerations is discretionary. In other words, under the new policy, the FWS is no longer required to consider whether areas should be excluded from critical habitat designation based upon economic costs and burdens. *See* Final Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, February 11, 2016.

Seventh, the problem with these new rules is what it means if private property (or Federal lands) are designated as critical habitat even if the designated habitat only has the potential to develop PCEs. Even if the species is not present in the designated critical habitat, a "take" of a species can occur through "adverse modification of critical habitat." For private land, that may include stopping stream diversions because the water is needed in *downstream critical habitat* for a fish species, or that haying practices (including the cutting of invasive species to protect hay fields) are stopped because it will prevent the area from developing PCEs in the future that may support a species. It could include stopping someone from putting on fertilizer or doing other crop management on a farm field because of a concern with runoff into downstream designated habitat. Designation of an area as critical habitat (even if that area does not contain PCEs now) will absolutely require more Federal permitting (i.e. section 7 consultation) for things like crop plans, or conservation plans or anything else requiring a Federal permit. In fact, one of the new regulations issued by Obama concludes that "adverse modification of critical habitat" can include "alteration of the quantity or quality" of habitat that precludes or "significantly delays" the capacity of the habitat to develop PCEs over time. *See* Final Rule, "Definition of Destruction or Adverse Modification of Critical Habitat," February 11, 2016.

While the agriculture community raised a huge alarm over the "waters of the U.S.," the FWS was quietly implementing these new rules, in a piecemeal manner, without a lot of fanfare. Honestly I believe these new habitat rules will have as great or greater impact on the private lands and Federal land permits as does the Ditch Rule and I would hope that the outcry from the agriculture community, private property advocates, and our congressional delegations would be as great.

Should you have any questions, please do not hesitate to contact me.

Mrs. LUMMIS. I thank the panel for their testimony. And as we begin questions, I want to remind our committee that we are limited to 5 minutes on questions.

With that, I recognize the gentleman from Nevada, Mr. Hardy, for 5 minutes.

Mr. HARDY. Thank you, Madam Chair. Back in September, the Department of the Interior proposed to withdraw approximately 10 million acres of sage-grouse habitat from new mining operations, despite the fact that the DOI found mining operations not to be a major threat to the species or its habitat. Instead it found wildfires and invasive species to be far greater threats for the greater sage-grouse.

This proposed withdrawal of sage-grouse focal areas would be the largest ever in the history of FLPMA, coming at a time when mining operations are already restricted or banned on more than half of our federally-controlled public lands. For a state like Nevada that depends on mining, and where more than 85 percent of our land is federally controlled, this would not only be a major blow to our state economy, but also to our national economy and American mineral security.

Ms. Falen, I want you to know that I, too, am a fifth-generation son of farmer-ranchers, but I got out of the business. So I appreciate your perspective on what you bring here today.

You mentioned the split between the consideration of economic impacts as part of the critical habitat designation, specifically the 10th Circuit Court of Appeals deciding that only those costs that are solely based on listing should be excluded from the economic analysis under the ESA. However, the 9th Circuit took an opposite view, that only the economic costs that are solely attributed to the critical habitat designation are to be included in an economic analysis.

You go on further to say that the Fish and Wildlife Service went ahead and issued the rule in 2013, determining that the 9th Circuit Court was correct.

Isn't this a case of the executive branch usurping its authority on the Supreme Court to resolve the court splits, and shouldn't the final rule maybe be looked at as unconstitutional?

Ms. BUDD-FALEN. Yes. Madam Chairman, Representative Hardy, I think that that is exactly right. This is the rule that you are talking about that was implemented on August 28, 2013. It directly looked at the split between the 9th Circuit and the 10th Circuit on what they call incremental analysis, or the baseline analysis for economic consideration.

I think the thing that I found most offensive about this is that the 10th Circuit made its ruling first. The 9th Circuit then made its ruling second. And, rather than immediately seeking cert in the Supreme Court, where, quite frankly, I believe we would have had a good argument to have the 10th Circuit ruling determined, the Fish and Wildlife Service simply left the split.

For a while, it was a big joke between our groups and the environmental groups of whether we were going to litigate in the 9th Circuit or the 10th Circuit, and now that entire opportunity to litigate in the 10th Circuit and get all critical habitat costs included has been eliminated. I believe that that is simply the Administra-

tion picking one court over another, and the Supreme Court should have had that opportunity to make that decision.

Mr. HARDY. Thank you. Following up on that, the 2013 rule stating that only economic costs attributed solely to the critical habitat designation shall be included in economic analysis, doesn't that determine or allow the Fish and Wildlife Service to disregard most economic costs associated with a critical habitat determination?

Ms. BUDD-FALEN. Yes. Madam Chairman, Mr. Hardy, I think that that is absolutely right. I can absolutely foresee the Fish and Wildlife Service arguing that, but for the listing, there would not be a need for critical habitat. Therefore, there are no costs associated with a critical habitat determination. That is not what Congress intended.

Mr. HARDY. You mentioned that under the ESA regulation, that the Fish and Wildlife Service is greatly expanding critical habitat designations by considering the designation of habitat that is or may be used for species, as well as the habitat that may develop primary constituent elements, or PCEs, at the undesignated time in the future.

With no time limit on which such development of PCEs may occur, or what types of events must occur so that the habitat will develop PCEs, doesn't that give the Fish and Wildlife Service carte blanche to designate anything and everything as critical habitat?

Ms. BUDD-FALEN. Yes, Mr. Hardy. That was the rule that was designated in 2016. And it plays directly in with the rule that was created in 2013, whereby anything could be determined to be potential habitat.

In fact, that rule goes so far as to also include migratory habitat, ephemeral habitat, temporary habitat, periodic habitat, none of which are mentioned in the Endangered Species Act. And I believe that then you can argue that almost anything has the ability to develop into habitat at some time in the future if we just manage it right. I am very concerned that just managing it right will mean the elimination of land use.

Mr. HARDY. My time has——

Mrs. LUMMIS. The gentleman's time has expired. The Chair will pull about 30 seconds off her own time in order to allow Ms. Budd-Falen to answer that question.

The Chair now recognizes the gentlewoman from Guam, Ms. Bordallo, for 5 minutes.

Ms. BORDALLO. Thank you very much, Madam Chairwoman, Ranking Member, and members of the panel for your testimony this morning.

Mr. Ashe, I want to thank you for your attention to the matters regarding our local Guam landowners and the Ritidian right-of-way. My office is working to get you the information you requested as soon as possible, and I hope that we can continue to work together to come to a temporary solution.

My first question is for you, Mr. Ashe. How does Fish and Wildlife's proposed definition changes impact ongoing Section 7 consultations?

Mr. ASHE. Overall, Ms. Bordallo, we do not see the changes as significant; certainly they have no effect on prior Section 7 consultations or critical habitat designations. New, ongoing, or future

consultations under Section 7 will be subject to the application of the new definitions and the revisions in the rules that the committee is considering today.

Ms. BORDALLO. So there will be future effects, yes. My second question, Mr. Ashe, is also for you. As we have heard in this hearing, designation of critical habitat only truly has an impact if there is a need for a Federal permit process.

To that end, if one Federal agency wants to return excess land to a local entity, consistent with Federal law and rules, if that excess land includes land designated as critical habitat, can you clarify if that would trigger Section 7 consultations or certain restrictions?

Mr. ASHE. If I am understanding the situation correctly, I believe that it would trigger a Section 7 consultation.

If a Federal agency were excessing, surplusing, or transferring land to a local entity or a private entity, and that land was identified critical habitat, it would be the responsibility of the agency to make a determination about whether that was likely to adversely affect the species; and, if they did, they would need to consult with either the U.S. Fish and Wildlife Service or the National Marine Fisheries Service.

Ms. BORDALLO. Thank you very much, Mr. Ashe. Madam Chairman, I yield back.

Mrs. LUMMIS. I thank the gentlelady. The gentleman from Texas, Mr. Gohmert, is recognized for 5 minutes.

Mr. GOHMERT. Thank you, Madam Chair. I appreciate the witnesses being here. I want to just go to Director Ashe for a moment.

Back in March, the Subcommittee on Oversight and Investigations tried to invite you to testify about the law enforcement database system, called IMARS for short. The Department of the Interior provided one witness, but I was curious since we have you here, what is your position on the IMARS electronic database?

There was a lot of discussion about Fish and Wildlife, and I am sure you heard about that discussion. So, I wanted to see if we could get you to express any concerns you might have. Obviously, Fish and Wildlife has not gotten on board over the years, so you must have concerns about it.

Mr. ASHE. Well, we have been working with the Department for a number of years.

Mr. GOHMERT. A number of years.

Mr. ASHE. A number of years, Mr. Gohmert. One of the most common refrains I hear in my work is people admonishing me when they see an instance of one size fits all, right? And I get admonished a lot for what people perceived as an instance of where I am trying to impose some kind of one-size-fits-all framework. And they are asking for flexibility.

I think with IMARS, within the Department of the Interior, the same thing is true. There are benefits of a centralized law enforcement database; but in a complex law enforcement agency like mine, trying to fit into a one-size-fits-all framework is more difficult.

We have been working with the Department of the Interior to try to support the effort for a unified database, but also recognize that we have the most complicated law enforcement capacity in the Department. We operate internationally, and we are right now in

the midst of developing a cooperative agreement in a pilot project with the Department of Homeland Security on the International Trade Data System, allowing us access to that system. And that is dependent upon the application of our existing system, LEMAS, within the U.S. Fish and Wildlife Service.

So, we have proposed to the Department of the Interior that we build a bridge system that would allow the sharing of data between those two systems, and we do that cooperatively. We are in ongoing discussions with the Department——

Mr. GOHMERT. OK.

Mr. ASHE [continuing]. And the Department of Homeland Security about how we can do that, but still move forward in the implementation of that pilot.

Mr. GOHMERT. Let me go to the one of the comments of one of my colleagues across the aisle, that made it appear that all of us on this side of the aisle want to do away with the Endangered Species Act. I don't. I really don't. But I have seen the inequities caused by the Endangered Species Act. I have seen the billions and billions of dollars that have resulted in saving maybe not even 1 percent of the endangered species. Some of us feel like there has to be a better way, where you do not take away private property rights.

Even though my one colleague may not feel like private property is a problem, there are some that feel like we ought to have big high-rises, where everybody lives in an apartment, and there are some at HUD who have dreamed of those types of things.

So, I would just like to ask—we have heard, "good for the bird, good for the herd." Do any of our witnesses know of situations where the Department of the Interior thinks it is good for the bird, but it is not really, in your opinion, good for the herd? Especially if you have herds.

Ms. LEVALLEY. Certainly, and I appreciate that. We also believe what is good for the bird is good for the herd. And again, our managed grazing on the landscape has yielded and exceeded the sage-grouse habitat guidelines for this.

But in response to that, once the bird was listed as threatened, and because the continuation of "now you should avoid areas," we are getting significant pressure, and there will be NEPA analysis to avoid whole areas, and basically take our managed deferred rotation, which involves multiple pastures across our public and private lands, and narrow that down, which we believe will not yield the same results as we are having now with the bird and for the industry as a whole, and our county.

Mrs. LUMMIS. The gentleman's time has expired.

Mr. GOHMERT. One witness that wished to respond. Could I get her response?

Mrs. LUMMIS. You know, the gentleman's time has expired.

Mr. GOHMERT. Yes, but there is——

Mrs. LUMMIS. The Chair now recognizes the gentleman from California, Mr. Huffman.

Mr. HUFFMAN. Thank you, Madam Chair.

Director Ashe, I want to give you a chance to respond to a claim that was made a little earlier, and I want to kind of check my own facts on this. It was stated that the Obama administration has

done more listings than any other prior administration. Just a quick Google search on my smartphone suggested that the Clinton administration had listed far more than the Obama administration. Can you just set us straight on this?

Mr. ASHE. That is true. We have not set a record for listing. We have done our job well, and we have done it according to a logical schedule; but it is not a record number of listings.

Mr. HUFFMAN. All right. Thanks for that clarification.

Mr. Mehrhoff, I know that there is a study published in *Science* recently that looked into ESA listings by both agencies, public petitions, and civil litigation from 1986 through 2012. I don't know if you are familiar with that study, but my understanding is that it found that the citizen-initiated ESA listings actually involve species that faced higher levels of biological threat, as determined by the Fish and Wildlife Service.

I want to ask you if you have any thoughts about why that might be. Why might citizen petitions and lawsuits actually target species that face greater biological threats than what we would get through the normal agency process?

Dr. MEHRHOFF. Thank you for the question. That is actually a pretty hard question to answer, as to why that might be. I would have to kind of speculate on that from my perspective.

Generally, the Services don't have a lot of funding for going out and doing survey work to try to identify, proactively, some of those species that might be at risk, at least not as much as probably necessary to be able to truly identify what species out there really need protection.

The citizens who are seeing things going on on a day-to-day basis may catch those quicker, because they are on the ground, and then say, "We feel that, based upon our experience here with this area, that this particular species needs to go forward." So, that would be one potential answer that I would have for that *Science* article and that particular finding. But it is a hard question.

Mr. HUFFMAN. There is this narrative out there that the litigation under the Endangered Species Act and using the Equal Access to Justice Act consists overwhelmingly of environmental groups abusing the court system and trying to force friendly settlements, et cetera. I know in California, every time protections for fisheries are proposed, we can guarantee a lawsuit under the ESA or any available mechanism by large water users like the Westlands Water District or the San Luis Delta-Minota Water Authority.

Mr. Bernhardt, I know you are familiar with those entities, having worked for them. I wanted to just ask you if you are familiar with the lawsuit filed by San Luis and Delta-Minota Water Authority challenging both the Delta smelt biological opinion and also the salmon biological opinion. Are you familiar with that litigation?

Mr. BERNHARDT. During the 2009–2010 time frame?

Mr. HUFFMAN. I believe so.

Mr. BERNHARDT. I am generally familiar with that litigation, yes.

Mr. HUFFMAN. In the litigation I just referred to, were attorney fees sought by the plaintiffs under the Equal Access to Justice Act?

Mr. BERNHARDT. I suspect they were; I don't know for sure.

Mr. HUFFMAN. My information is that they were. And, in fact, they lost every one of their Endangered Species Act claims, but in

each case found a narrow technical NEPA violation and, on that basis, were able to recover significant attorneys fees against the government. Does that sound correct?

Mr. BERNHARDT. I would say that they did not lose each of their claims. To be awarded attorney fees they had to prevail in some way.

Mr. HUFFMAN. On the NEPA——

Mr. BERNHARDT. On the procedural claims——

Mr. HUFFMAN. But it is a matter of——

Mr. BERNHARDT. And they were both substantive and procedural claims——

Mr. HUFFMAN. I will represent to you as a matter of fact that on each of the ESA claims they lost——

Mr. BERNHARDT. They won in district court and they lost in the 9th Circuit. That is correct.

Mr. HUFFMAN. Well, that is a loss.

Mr. BERNHARDT. Sure.

Mr. HUFFMAN. Yes. Director Ashe, you have said that in terms of challenges that you face implementing the Endangered Species Act, litigation does not even show up on the radar screen. That is a quote from you back in 2012. So, let me just ask you—in 2016, where does litigation stand on the continuum of challenges you face making the ESA work?

Mr. ASHE. I think, over the history of the Endangered Species Act, litigation has, on balance, been a positive influence in the implementation of the Endangered Species Act. In my particular case, it certainly is frustrating from time to time. Certainly, it is always frustrating when you lose in court.

But habitat loss and destruction, climate change, invasive species, fire, water drought, and water scarcity are far and away the biggest challenges that we face in the conservation of species. Litigation is still not even on the radar screen.

Mr. HUFFMAN. Thank you.

The CHAIRMAN [presiding]. Mrs. Lummis.

Mrs. LUMMIS. Thank you, Mr. Chairman. I want to focus my questions on the rule allowing for critical habitat designation if the land merely has the potential to develop primary constituent elements. Now, as I understand it, those are the elements of species needs for breeding, feeding, and sheltering.

As I understand it—and, Mr. Ashe, I have some questions about how this is going to be implemented—it looks like the Fish and Wildlife Service will initially consider designations of both occupied and unoccupied habitat. So, even if a species is not present in the designated critical habitat, a prohibited take of a species can occur through adverse modification of critical habitat. So that is going to be the focus of my questions.

Mr. Ashe, how could a landowner, a permittee, know whether their land has the potential to be critical habitat? It sounds pretty subjective.

Mr. ASHE. Well, we have the obligation to propose and then publish critical habitat. So the landowner would know that their land was critical habitat because we would propose it, then publish and demarcate a map that showed the landowner that their land was in critical habitat. If we chose to designate unoccupied habitat, we

have the obligation to demonstrate with a scientifically-based administrative record showing the case for why that habitat is necessary to support the conservation of the species.

Mrs. LUMMIS. My biggest concern is the part that habitat could develop at some undetermined time in the future. That language opens up, quite frankly, every undeveloped piece of land in the state of Wyoming. It could be deemed potential critical habitat for any creature.

Why does the Fish and Wildlife Service want to consider designating critical habitat deemed unusual by a certain species, or habitat that could develop at some undetermined time in the future? Why would you want to designate that?

Mr. ASHE. The goal of the law is to protect and recover listed species for species that are habitat-limited. We obviously have to find or make the habitat to support recovery of that species.

In the case of potential habitat, Mrs. Lummis, I would say that the obligation is on us to create an administrative record that documents why we see the potential in habitat. We would have to show why we see the potential for the development of habitat.

So, when we are facing something like climate change, and we see the potential for sea level rise, we have to see a future for the conservation of sea turtles, for instance, that will be affected by sea level rise, and we have to see the potential for habitat for them in the future.

Mrs. LUMMIS. Let me give you an example on private land that is specific to Wyoming. Could an adverse modification be used to stop stream diversions because the water is needed in a downstream critical habitat for a fish, even if that water is historically permitted for irrigation?

Mr. ASHE. The short answer to your question is yes. I do want the committee to understand, though, that adverse modification determinations are exceedingly rare. In fact, I cannot even think of one during my term as director. I cannot think of a single adverse modification determination that the Fish and Wildlife Service has made.

So, the hypothetical that you raise, to be fair, the answer to that is yes; but the statute and our regulations create a high bar for that determination, and they are exceedingly rare.

Mrs. LUMMIS. Will the Agency provide a timeline for when future development occurs for the elements a species needs in critical habitat?

How far out in the future, if you choose to designate land as having potential to be critical habitat, will activities be prohibited on that land?

Mr. ASHE. Again, I would think the committee should bear in mind that the designation of critical habitat does not prohibit any activity. What the designation of critical habitat does is it says that a Federal agency cannot——

The CHAIRMAN. Mr. Ashe, I am giving you 10 seconds to actually answer the question. You are over.

Mr. ASHE. I am happy to stop.

The CHAIRMAN. I will give you 10 seconds to give her an answer.

Mr. ASHE. Well, it does not prohibit any activity. How long into the future? The law asks us to see foreseeable future, so that can differ in the context of each species.

The CHAIRMAN. OK. Mr. Lowenthal, you are recognized for the foreseeable future.

[Laughter.]

Dr. LOWENTHAL. Thank you.

The CHAIRMAN. By me that is 30 seconds. By him, that is 7 years. So——

Dr. LOWENTHAL. Thank you, Mr. Chair, and I will take up all that time as you have given to me.

[Laughter.]

Dr. LOWENTHAL. First I want to thank our witnesses for being here. I would like to take a moment now to mention an endangered species success: the recovery of the island fox on Catalina Island, which is an endangered species in my congressional district.

When the Center for Biological Diversity and the Institute for Wildlife Studies petitioned the Fish and Wildlife Service in June of 2000 to list the species, there were identified at that time 103 island fox left on the island, on the entire island. After listing in 2001, and a lot of work—hard work, I might say—by both the Fish and Wildlife Service, the Catalina Island Conservancy, and other local partners, the population of the Catalina Island fox has rebounded now to more than 1,700 individuals.

So, the Fish and Wildlife Service announced recently they are considering downlisting the Catalina Island fox from endangered to threatened, because the species is recovered biologically, but the threat of disease still remains.

Mr. Ashe, thank you to the Fish and Wildlife Service for the work you have done and continue to do to ensure a sustainable population of our iconic island fox. And Mr. Mehrhoff, thank you and your colleagues at the Center for Biological Diversity for petitioning the Service for an Endangered Species Act listing 16 years ago. Without the Endangered Species Act, I believe the Catalina Island fox would most likely be extinct today.

So, to Mr. Ashe, do all endangered species receive a critical habitat designation?

Mr. ASHE. No, sir. The law requires us to designate critical habitat at the time of listing if it is prudent; and then, otherwise, within 1 year of listing a species. Like all work under the Endangered Species Act, we have more work than we have the resources to accomplish—we have to put that into the context of a system of prioritization.

Dr. LOWENTHAL. Thank you. I know you have answered this before, but I want to hear it again. Does having a critical habitat designation on an area prohibit all future development?

Mr. ASHE. No, it does not.

Dr. LOWENTHAL. Thank you. I want to ask Mr. Mehrhoff. My colleague talked before about the impact of the Endangered Species Act to private property owners. My question to you is, will this rule affect private actions on private property that do not require a Federal permit, license, or funding?

Dr. MEHRHOFF. It should not. It is specifically designed to deal with Federal agencies. So if there is a Federal agency that is

taking some sort of an action—even giving money to someone—then there is a nexus, if you will, for critical habitat. Otherwise, there isn't, that I can see. In my experience, there has not been anything that is mandated by that action.

But I do want to say thank you for bringing up the island foxes. It is a great success story.

Dr. LOWENTHAL. It is a great success story, just recently——

Dr. MEHRHOFF. And a wonderful, wonderful thing.

Dr. LOWENTHAL. Yes, it was. We just recently, my district staff and myself, spent time there. And people are so, so excited about that.

I want to hear from your point of view. I know Mr. Ashe has answered the question. How often does an adverse modification determination—do you know, has it ever occurred?

Dr. MEHRHOFF. I have not seen one. There have been times when we have looked at that, back in my previous time with the other agencies, whether it was Fish and Wildlife Service or Park Service; but none of those ever came to be, because working with the action agencies, we found ways around those adverse modifications, to where the project went forward and accomplished the mission that that agency had.

So, I have not seen an adverse mod. That is the shorthand version for it, sorry. That does not mean that there shouldn't be one or couldn't be one, but I have not seen one, personally.

Dr. LOWENTHAL. Thank you. And quickly, one of your organization's complaints with the final rule is that cumulative impacts are not addressed. Why are cumulative impacts so important to endangered species recovery?

Dr. MEHRHOFF. Cumulative impacts are important, particularly when you have a very large, widespread species, where it is more easy to see how small, little things happening inside of critical habitat occur.

As Director Ashe mentioned, critical habitat does not necessarily stop projects. A lot of times, it focuses on ways to have them occur quickly. So we do that and, generally speaking, you miss what happens, as far as impacts go.

Dr. LOWENTHAL. Thank you, and I yield back, Mr. Chair——

The CHAIRMAN. Thank you.

Dr. LOWENTHAL [continuing]. Even though I was given unlimited time.

The CHAIRMAN. Your 7 years is not up yet, but thank you for giving a success by the Bush administration.

Mr. McClintock, you are recognized.

Mr. MCCLINTOCK. Thank you, Mr. Chairman. I would like to pick up on that line of questioning. We are constantly told that critical habitat designations have no economic impact; nothing to see here, folks, move along.

Mr. Bernhardt, can you tell us, is that true? Are there costs involved with this?

Mr. BERNHARDT. There are significant costs associated with the designation of critical habitat.

Mr. MCCLINTOCK. Such as?

Mr. BERNHARDT. Certainly, the substantive provisions and the legal effect of critical habitat only affects Federal agencies, but

critical habitat does have meaning in other contexts. It affects what people perceive of the land, it affects how folks look at that property. And I will tell you that there is another way that is very significant——

Mr. MCCLINTOCK. So does it reduce the property values for those——

Mr. BERNHARDT. I would turn to others to answer if it actually creates a reduction in——

Mr. MCCLINTOCK. Well, let me turn to Ms. Budd-Falen, then. Perhaps you could give us some guidance, or Ms. LeValley.

Ms. BUDD-FALEN. Certainly yes, Mr. Chairman. I believe that critical habitat designation can reduce property values, particularly if you are looking at a ranching operation that has Federal grazing permits tied with it, and all of a sudden then you are looking at sage-grouse mitigation, pigmy rabbit mitigation, or whatever other permitted species is on the Federal land. It reduces that ranch unit value.

Mr. MCCLINTOCK. Are any of you aware of examples of investors or job creators pulling out of projects because of a lengthy consultation process involving these designations?

Ms. BUDD-FALEN. Yes, Mr. Chairman, I am. For example, I worked with a guy in Oregon that was trying to do a wind power project and put up wind towers. The Section 7 consultation and the NEPA got drug into the Interior Board of Land Appeals Courts with the BLM. The consultation and the NEPA was so lengthy that all of the investors simply pulled out.

We are still actually in court because we believe we are right, and it would not have happened. But even at the end of the day, that wind power project will never be built simply because they could not stand the length of time of appeals and permitting that it took because of ESA.

Mr. MCCLINTOCK. Is that typical?

Mr. BERNHARDT. Congressman, there is another very significant effect. This is really not technically a legal effect, but it is significant.

If you are taking an activity on private land in an area that is designated critical habitat, very often when you walk in and talk to the Services about that—even though it is not legally required—at a field level they will push you very hard to seek a permit under Section 10, even if you are not likely to constitute take. Because, at the field level—even though it is not truly legal—they do perceive strongly that part of their mission is to protect this critical——

Mr. MCCLINTOCK. This insidious thing. We are told officially, "Oh, this has no impact on human activity," but what you are saying is it is used as an excuse for major activity on private and public land.

Mr. BERNHARDT. What I would say is that the government is right that, as a legal matter, the designation of critical habitat is largely focused on Section 7 of the Act. That is where the legal rubber meets the road. But there are other——

Mr. MCCLINTOCK. But in practice, the ramifications are that it is used for other——

Mr. BERNHARDT. That is right, sir. It is not irrelevant to other significant activities. In fact, it is very relevant.

Mr. MCCLINTOCK. Very good. I would like to press on. One of the spectacular stories of failure has been the spotted owl. The restrictions on habitat on the spotted owl have been attributed to, basically, the destruction of the timber industry throughout my district in the Sierra Nevada.

What is worse, they seem to make it impossible for us to properly manage the lands. As a result, we have lost dozens of spotted owl habitats to catastrophic wildfire, because we have not been able to get in there to manage the land because of these restrictions. Was that the original intent of the Act?

Mr. BERNHARDT. I am happy to address that question. The answer is no, that was not the original intent of the Act. It is not the current intent of the Act, and it is probably not the current intent of the administrators of the Act.

But the reality is when Director Ashe says, "Adverse modification decisions have been rare, and we are hopeful that they won't happen more often in the future," I would like to believe him, because I think that that is—number one, he is right historically, and hopefully he is right perspectively.

But here is the problem, as I see it. They are going to designate areas that were not occupied by species when the species was listed, and that currently do not have——

The CHAIRMAN. Ten seconds to answer quickly.

Mr. BERNHARDT [continuing]. Any features for consultation. So, when a Federal agency goes in for a consultation, the agency is going to say, "I think you are delaying the development of these features."

And you are going to say, "Well, where are the features?" And they are going to say, "Well, we think they are delaying them." And their requirement is going to be merely——

The CHAIRMAN. I am sorry. My definition of 10 seconds is a little bit less than yours.

Mr. BERNHARDT. I am sorry.

The CHAIRMAN. But you got the answer in there.

Mrs. Dingell.

Mrs. DINGELL. Thank you, Mr. Chairman.

Mr. GRIJALVA. If you could yield just a second?

The CHAIRMAN. I didn't recognize you at all.

Mrs. DINGELL. That is all right.

The CHAIRMAN. I have no idea who you are, have never seen you before.

Mr. Grijalva.

Mr. GRIJALVA. No, I was asking Mrs. Dingell to yield just for one question, before we get away from it.

The CHAIRMAN. I now know who you are.

Mrs. Dingell, you are recognized. You want to yield to a question from Mr. Grijalva?

Mrs. DINGELL. I will yield to my Ranking——

The CHAIRMAN. You got it.

Mr. GRIJALVA. Mr. Ashe, on the accusations of loss of property values, burdensome requirements that prevent development

because you have to seek those permits, any evidence one can stand up in front of these accusations and say it is fact or not?

Mr. ASHE. Mr. Grijalva, I am aware of no scientific evidence whatsoever that critical habitat has resulted in reduction of property value. I would say, the next time any of you are flying into Las Vegas, look to the north and west from Las Vegas, and you are going to see the largest commercial solar facility in the world, the Ivanpah BrightSource Solar Facility. That is right smack dab in the middle of desert tortoise critical habitat.

Mr. GRIJALVA. Well, I am working on borrowed time. Thank you, I yield back.

Mrs. DINGELL. Thank you, Mr. Chairman.

Mr. GRIJALVA. Thank you.

Mrs. DINGELL. I know I now have 4 minutes left, and I have to say that I am probably one of the only people here that is blessed to have been up at 3:00 a.m. talking to the original sponsor of the Endangered Species Act.

[Laughter.]

Mrs. DINGELL. And I will look at my distinguished colleague from the Upper Peninsula, and it was the wolves that had me started.

But having said that—and I won't tell you where we came out—it is clear that I am concerned about some of the claims that are being made today. For me, the legislative history and a reading of the statute—the ESA is designed to conserve both the species identified as endangered or threatened with extinction and the ecosystems they depend on to survive. So I want to explore that a bit further.

Director Ashe, we have heard these theories that I don't know that I really agree with about how designating critical habitat in areas of species range that are only sometimes utilized by the species, that it is outside of the Service's authority under ESA. Do you agree? Do you believe that the authors of the Endangered Species Act intended for the species to remain on house arrest, unable to visit the places they go to eat, breed, and avoid conflict?

Mr. ASHE. No, I don't, Mrs. Dingell, and it is unequivocal. The law actually speaks specifically to critical habitat and the designation, and authorizes the designation of both occupied and unoccupied habitat.

Mrs. DINGELL. For the record, the original author agrees with you. In fact, the Fish and Wildlife Service has been designating unoccupied territory as a critical habitat for years. Is that correct? And these new regulations are simply a good government attempt to consolidate existing authorities and practices in one place. Correct?

Mr. ASHE. That is correct.

Mrs. DINGELL. OK. So now I have 2 minutes and 15 seconds, so we are going to talk fast.

In her testimony, Ms. Budd-Falen characterizes conservation biology as agenda-driven science. The use of that phrase is obviously meant to imply that conservation biology is not legitimate or not as "sciencey" as other science. So, I would like to ask Mr. Mehrhoff, do conservation biologists use the scientific method? Doctor—I am sorry, I should have said Doctor.

Dr. MEHRHOFF. That is quite all right. Actually, they do, particularly if they want to get anything published. So it is a field of science, like anything else that we deal with, like medicine, which does have an objective also, to kind of keep us healthy. Conservation biology also has all of the same scientific rules, constraints, requirements, et cetera. So it is a fully legitimate, hard-core science.

Mrs. DINGELL. Are any of the standards for receiving a master's degree or Ph.D. in conservation biology any less stringent than they are for receiving a degree in chemistry, physics, or just plain old biology?

Dr. MEHRHOFF. Not to my knowledge.

Mrs. DINGELL. OK——

Dr. MEHRHOFF. They are all right there——

Mrs. DINGELL. Let's keep moving, because we are down to a minute.

Doctor, do academic journals that publish studies by conservation biologists require those studies to be peer reviewed?

Dr. MEHRHOFF. The better journals do, absolutely.

Mrs. DINGELL. So, is there any evidence at all to support the claim that the field of conservation biology is driven by anything other than a search for knowledge or that it is any less rigorous than any of the other natural sciences?

Dr. MEHRHOFF. It is a search for knowledge, agreed. And it is very rigorous, agreed.

Mrs. DINGELL. Thank you. It is clear to me that conservation biology is an accepted science practice, and one that has yielded incredible gains in species protection. I hope that the committee will keep this in mind as it moves forward, and I yield back my 25 seconds, Mr. Chairman.

The CHAIRMAN. Thank you. Mr. Thompson, you have 5 minutes and 25 seconds.

Mr. THOMPSON. Chairman, thank——

The CHAIRMAN. No, five.

Mr. THOMPSON. Thank you. Hopefully I will give you change back at the end.

Thanks to all members of the panel for being here today. Thank you, Director Ashe. I really appreciate the folks, many who are working with your Service. I spend time with them. I was just inside a cave, a rather large cave, with one of your excellent staff, Laura Zimmerman. We were looking at bats. I want to ask you about bats. I was there in a collaborative way. I was there with the Pennsylvania State bat biologist technician.

But here is my impression of your agency right now: schizophrenic, at best, and one that takes one step forward and two steps backwards.

You talked about the partnership with NRCS. I chair the conservation committee, I do support conservation as a science. And, as a science, we should rely on data in science and try to put other agendas aside. And you talked about some of the victories and successes we have had partnering with NRCS in the Department of Agriculture. That has been done in a collaborative way and that has been very effective.

And I think the successes we have had have been because of a change of attitude and strategy that, to some degree—although not

completely—Fish and Wildlife Service has embraced. For the NRCS Department of Agriculture, conservation and collaboration projects kind of define them.

I compare that to how effective those have been compared to the top-down controlling approaches that have excluded Congress, have excluded private property owners, have excluded maybe not all key stakeholders, but certainly ones that should be at the table. So that is the schizophrenia part. What seems to be working is collaborative, and not top-down, not controlling, not excluding.

OK. Well, I wanted to talk about bats. Why don't we do that? As you know, 38 states, including Pennsylvania, will be impacted by the listing of the Northern long-eared bat as threatened under the ESA. The underlying problem in this instance is not habitat loss, but rather the white-nose syndrome, a fungal disease. In fact, Congress has provided you, I think, some great investments, in terms of researching that disease. We have, I think, for the past 2 years.

Now, how specifically does Fish and Wildlife intend to implement this new designation of threatened for the Northern long-eared bat, while ensuring that critical activities such as agriculture, timbering, forest management, and energy production in those 38 states are allowed to continue?

Mr. ASHE. I think it is actually a great demonstration of the flexibility that is inherent in the Endangered Species Act, and our ability to apply it. We listed the bat as threatened, which allows us the flexibility to tailor the restrictions in the law.

With the long-eared bat, what we did was—since white-nose syndrome is what is devastating these bat populations, we said we are only going to use the Endangered Species Act to protect critical life stages of the bat. We are protecting hibernacula; we do not want disturbance of the bats when they are in that sensitive stage of hibernation. We are also protecting nesting trees, known nesting trees, only during the pupping season, which is, I believe, June to August.

So, we have tailored the restrictions of the law down to the bare minimum necessary to secure very sensitive life history stages for the bats; and we have exempted all other activities, like forestry, rights-of-way, oil and gas development, things that affect, potentially, the habitat of the bat. But habitat is not a limiting factor for the bat, it is the white-nose syndrome disease. So we have very specifically tailored the restrictions of the law to the bare minimum necessary to achieve our conservation objective.

Mr. THOMPSON. I do appreciate when we are able to work using collaborative conservation approaches. I have witnessed that a number of times, where there have been disagreements with—whether it is individuals putting housing developments and there was a threat to Indian bat.

Mr. ASHE. Right.

Mr. THOMPSON. And the fact that, when folks come to the table, we are able to work through those. But I do have concerns with these regulations you have written, because they do not seem to be in that spirit. They seem to be more controlling, and I don't think that works as effectively at all.

The CHAIRMAN. Mrs. Capps.

Mrs. CAPPS. Thank you, Mr. Chairman Bishop and Ranking Member Grijalva. There is no question that humans have adapted and expanded to a growing number of ecosystems across the planet. While this expansion has demonstrated great ingenuity, it has also brought with it many unintended consequences.

Humans have greatly altered the landscapes and waterscapes that plants and animals have lived in throughout history. In some cases, we have compromised habitat so much that species have become endangered or, in the worst of circumstances, they have become extinct. However, in recognition of this growing threat to these species, Congress recognized it needed to act, and passed the Endangered Species Act.

Since 1973, this Act, ESA, has been one of the Nation's most important conservation laws. Since then, ESA has worked to successfully prevent the extinction of hundreds of vulnerable species. There is still a long road ahead.

Along the Central Coast of California, my congressional district, there are over 70 species that are threatened or endangered. While this number is daunting, there are some exciting success stories, one of which my colleague, Mr. Lowenthal, already referred to, because, through extensive effort and significant collaboration, the Fish and Wildlife Service worked with many stakeholders to implement a recovery plan for four subspecies of the island fox endemic to the Channel Islands off the coast of Santa Barbara in my district.

Despite having populations that were down to the teens for some of the subspecies, three of the four listed subspecies now have recovered to the point that there is a proposal to delist them. This recovery marks the fastest recovery of any mammal population of the United States, something that we are very proud of.

However, successfully protecting species requires significant effort, extensive collaboration, and utilization of a lot of data. Specifically, the Fish and Wildlife Service and NOAA must understand what a species needs to recover. You do a lot of background work.

So, Mr. Ashe, first I want to thank Fish and Wildlife for all the hard work you put in. I do this on behalf of my constituents—that is a big tourist area draw out there—and every other species to recover. So could you elaborate just briefly on what information you need in order to develop? What is the path that this island fox now has demonstrated is effective?

Mr. ASHE. First of all, you have to understand the threats to the species. What are the limiting factors for the species? With the island fox, in some cases it was predation, direct predation, from golden eagles.

Mrs. CAPPS. Right.

Mr. ASHE. And we had to deal with that species-to-species conflict. And then it was just erosion of the habitat from other invasive mammals and change in the habitat structure. So it required control of other species of mammals on the island to support a better habitat basis for them.

Mrs. CAPPS. And you work with other stakeholders, right? I mean maybe you could list——

Mr. ASHE. We do, exactly.

Mrs. CAPPS. Talk about that.

Mr. ASHE. We work with local community, we work with the National Park Service, we work with the state of California. It is the collaboration that Mr. Thompson was talking about.

Mrs. CAPPS. Good. Now, Dr. Mehrhoff, identifying and protecting the appropriate habitat is an important component of a recovery effort. I mean this is a joint goal that you work with many agencies about. Can you explain how critical habitat designation is important to meeting the needs that Director Ashe outlined?

Dr. MEHRHOFF. Certainly. Critical habitat is very important. I most recently have been in Hawaii, where we have a lot of species that have been reduced to very low numbers—12 plant species with one individual left in the wild, that level of endangerment. When you are dealing with that, where that plant occurs right now will not be nearly enough to actually meet what it needs for recovery, to get it off the list.

So, you need to look at what areas potentially in the future the species needs in order to get to a healthy population so that it can allow for delisting of the species. So it is really important to have good science, and to identify the areas that are currently needed, currently occupied, and then what other areas that are unoccupied that need to be provided protection in order to make sure you get to your recovery numbers. Thank you.

Mrs. CAPPS. Thank you very much, and I yield back my time. But it is wonderful to have some success stories to celebrate. Thank you very much.

The CHAIRMAN. Thank you.

Mr. Benishek.

Dr. BENISHEK. Thank you, Mr. Chairman. Thank you all for being here this morning.

Ms. LeValley, do you feel as if these changes in the rules are inconsequential?

Ms. LEVALLEY. Again, we have worked in cooperation with Fish and Wildlife Service, with the BLM to manage the landscape, to manage for the benefit of the Gunnison sage-grouse.

Where I think the uncertainty comes in is in the actual listing. When we talk about having to look at a map to determine critical habitat without clear parameters and no specific landowner notification, that is a concern. And again, where we are talking about the adverse modification potential, I clearly appreciate that there has been no action to date. But where you have the continual litigation, it just opens the door for additional litigation for the potential for the adverse—those are the concerns that we have, as far as the unintended consequences.

Dr. BENISHEK. Ms. Budd-Falen, do you feel as if these rule changes are inconsequential?

Ms. BUDD-FALEN. No, I think these rule changes are absolutely consequential.

Dr. BENISHEK. That is my real problem with this whole situation we have in Washington, is that this Administration, supported by some members of the Minority, changed the rules and then called them inconsequential without realizing that this affects people on the ground. It may not be consequential to the bureaucrats here in Washington, but it is certainly consequential to the areas where

people live and work and try to make a living. So, I just think that is an odd designation.

Ms. LeValley, let me ask you another question. In the next few years, if the Fish and Wildlife Service proposed to delist another species in your general vicinity, what would your initial reaction be? Would you be concerned or would you have any confidence they would be able to continue to work with them? And can you do your business without drastic change?

Ms. LEVALLEY. We are already experiencing change when we continue to get the push to change what we are doing on the ground now, even though what we are doing now on the ground has yielded and exceeded the habitat guidelines. We are already getting the change.

So when another species come, which species wins, which critical habitat wins? What are we supposed to manage for? That is, to me, again, the other unintended consequence. When we talk about the science in all of this, it is very hard to meet a statistical significance in science when we actually have the reflection of the grazing that is being done on the ground now.

So we have to have such broad parameters for that that we often lose sight of what is actually occurring on the ground when we talk about statistical science and that——

Dr. BENISHEK. Do you feel that the Fish and Wildlife Service is a collaborative? I mean Mr. Thompson was talking about collaboration and things that you mentioned that you have been doing right along. But do you feel that the Fish and Wildlife Service is a collaborative partner in this, or do you feel like it is more of an adversarial relationship?

Ms. LEVALLEY. Again, we are working with them, but there are times, especially recently, when we have been in meetings where the Fish and Wildlife Service has said, when we are in meetings with BLM, "Our preferred alternative is no livestock grazing." That is concerning.

Dr. BENISHEK. Ms. Budd-Falen, do you have any comments along those lines?

Ms. BUDD-FALEN. Obviously, I think it depends on the individual, whether they are collaborative or not. Several times the sage-grouse CCAA in Harney County has been mentioned, which is the one that they are counting in Oregon as such a great success story, where they talk about the bird and the herd. Those Fish and Wildlife Service people actually stated to me that they went out on a limb to do that, because the habitat conservation looked at the entire habitat and the land, not just the species itself.

And for that area, that was a whole new ball game to look at. That is why the landowners support it, because the collaboration occurred looking at the ecosystem, not just the sage-grouse. But the Fish and Wildlife Service is a species-oriented agency, not an ecosystem-oriented agency, and that causes great problems to those of us that have to live with the decisions.

Dr. BENISHEK. Let me ask Mr. Ashe a follow-up to that statement.

Mr. Ashe, what do you say to that species-oriented versus ecosystem-oriented remark there by Ms. Budd-Falen?

Mr. ASHE. Well, there——

The CHAIRMAN. And you have 9 seconds.

Mr. ASHE. Yes, really. There is no distinction between species and the ecosystem that they live in. The Endangered Species Act says it is our responsibility to conserve the species and the ecosystems on which they depend.

Dr. BENISHEK. All right. I am sorry. Thank you.

The CHAIRMAN. Mr. Polis.

Mr. POLIS. Thank you, Mr. Chairman. First I want to welcome Ms. LeValley from Colorado. She is from just a bit outside my district, but truly one of the most beautiful parts of our state, and we welcome her before our committee. Our county administrators juggle a great number of balls, and we appreciate you being here to share your wisdom with the Congress.

My question is for Director Ashe. Of course, the most important thing that can be done to avoid any controversy over critical habitat designation is to proactively protect species habitat so that a listing and critical habitat designation are not even necessary. I wanted to thank you for your collaborative proactive approach for conserving the habitat of the greater sage-grouse so a listing is not necessary in that case.

As this committee has discussed, and as your work indicates, protecting the sage-grouse's habitat is important, not only for that particular bird, but also for deer and elk, hunters and recreationists, and many others who place a high value on protecting our sagebrush ecosystem.

I find it ironic that those who opposed the efforts of the agency to have a negotiated protection of sage-grouse habitat through a collaborative approach also oppose what happens in the failure of such an approach: namely, critical habitat designation. I think that this kind of collaborative approach is the best way to prevent the very kind of critical habitat designation that is being discussed before the committee today.

I was hoping you could update me and the committee on your efforts to work with Federal, state, local, and industry partners to implement protections for sage-grouse, and comment about the role of wilderness and other protected areas in ensuring that species' habitats remain intact and, therefore, can avoid listing, and recovering a species and habitat so that species can be delisted.

Mr. ASHE. Thank you. Mr. Polis, I refer back to Secretary Jewell's remarks—when we made our announcement on the sage-grouse, calling it "epic collaboration." Really, when you think about the NRCS, the U.S. Forest Service, the Bureau of Land Management, the U.S. Fish and Wildlife Service, thousands of private landowners, and 11 range states, it was just extraordinary collaboration to get to that point.

And to your point about wilderness and protected lands, one of the key aspects that allowed us to get to that not-warranted determination was that Federal land base, and particularly what BLM and the Forest Service have called the sage-grouse focal area. We had high-quality habitat. Under Federal land stewardship, we could put additional protections on top of that and we could see into the future. We could see that we would have abundant, distributed, genetically-connected populations of sage-grouse into the future, supported by that network of protected public lands.

Mr. POLIS. Do you see all of these as tools in the toolbox toward the same end? And how important is critical habitat designation as one of those tools?

Mr. ASHE. They are all important tools in the toolbox. Critical habitat? As an administrator, I would say sometimes it feels like the juice is not worth the squeeze, because it has become so controversial. But the impact of critical habitat, as we have been talking about here today, is not what many people make it out to be.

But, as Dr. Mehrhoff said, I think the fact that that habitat is identified as being important, the fact that Federal agencies have an obligation to protect it in the context of Section 7 consultations, they exercise their discretion in a way to support the continuing viability of that habitat. So, overall, it is all part of the important toolbox that we have.

Mr. POLIS. And, Dr. Mehrhoff, in the final 45 seconds I want to give you a chance to set the record straight about what a critical habitat designation means, and if these rules make a difference in what that means.

Dr. MEHRHOFF. I think these rules pretty much keep things in the status quo. That is the quick answer to that.

As far as critical habitat and how things are playing out, one of the great things about the Endangered Species Act is that it is wanting to make sure that the left hand wasn't doing something that the right hand wasn't doing; so it really tried to make sure that agencies collaborated with each other in the consultation process.

Critical habitat is one of those things that is really important and turns around and dovetails quite nicely into all the recovery efforts. Having it there really identifies the key issues, the key habitat that needs to be protected, and focuses all the agencies to at least consider it, and not inadvertently cause the extinction of a species.

Mr. POLIS. I thank the Chair and I yield back the balance of my time.

Dr. GOSAR [presiding]. I thank the gentleman, and now will yield his time to Mr. LaMalfa from California.

Mr. LAMALFA. Thank you, Mr. Chairman. We have had just a tremendous amount of wildfire in the West. Over the past 15 years, there is an average of a little over 320,000 acres burned in California each year. A more aggressive implementation of the 40-plus-year-old Endangered Species Act is severely limiting the ability of the Forest Service to prevent future fire and to restore burned lands.

Up in my area, we are talking now about a fall of 2014 fire. The Forest Service, implementing the Section 7 consultation, or actually not doing so, delayed what should have been a 90-day process. It took over a year. And now, about a month ago, the consultation finally was issued, where the lands that had burned in the fall of 2014, can now start—4 percent of them is what the project is trying to do, 4 percent on the west side fire, Western Siskiyou County, to be salvaged.

We know what happens when you wait that long. If you wait more than 6 months, up to a year, the value of the timber, the ability to salvage it and gain something from that, it deteriorates every

day. So, the Yreka office of the U.S. Fish and Wildlife is working through that Section 7 process.

Mr. Ashe, I would like to ask you why evidently the Portland office, which supersedes them, came in and said, "We are not going to give you a consultation," so it drug out the process for a year, instead of 90 days, where, collaboratively, the Yreka office was working on that. Somebody up there decided, "We don't want this to happen." Ostensibly, over spotted owls.

Isn't it reasonable to expect that U.S. Fish and Wildlife can meet the 90-day deadline for a consultation?

Mr. ASHE. Deadline for consultations is 135 days, and it is reasonable to expect us to accommodate that deadline unless, of course, we do not get the information that is necessary for us to do the evaluation. Oftentimes, we do not get adequate information to allow us to do the evaluation. But I am not familiar with that particular case, and I am happy to find out about it and come speak to you about it.

Mr. LAMALFA. OK. We have an individual in the Portland office that just decided they did not want it to happen.

So without having to declare critical habitat, the process can slow it down. We have other examples that include farming and ranching operations in my part of the state that somebody from Army Corps wanted to decide it was a wetland. The person could not use their land for 3 years because they were under the threat of prosecution, even though no actual charges were filed.

We have other cases where EPA decides by plowing your land that it could be changing the waterways under the Clean Water Act.

Does this all feel pretty good, Mr. Mehrhoff, that you can ball people up like this? You heard Ms. Falen and Ms. LeValley, I mean, you guys are having your day right now, but the people out here in the West are really frustrated by things that do not actually help when we have 1 percent of species that actually reach the recovery mode. Does that feel like a win for you all?

Dr. MEHRHOFF. Well, I think that, certainly, we feel that the Endangered Species Act has been a win, and its implementation has been good.

Mr. LAMALFA. What, a 1 percent recovery rate for all the billions we spend——

Dr. MEHRHOFF. One percent recovery rate, when you put it against the expectations of what it should be, is not too bad.

Mr. LAMALFA. Well, it sounds like you have a whole list of other stuff that you are having people out there look for, too.

Dr. MEHRHOFF. There are going to be lots of folks——

Mr. LAMALFA. Expand the list even more.

Dr. MEHRHOFF. Lots of things.

Mr. LAMALFA. Yes.

Dr. MEHRHOFF. I think it is important to identify them, yes.

Mr. LAMALFA. Mr. Bernhardt, I am going to shift.

Mr. Bernhardt, I heard you lost some of those rounds in the 9th Circuit. The gentleman over there said that is a loss. Well, it is not really a loss, given the record of the 9th Circuit; it just means it has not gone to a reasonable court yet. I am glad that at least the

Equal Access to Justice Act can actually be equal for somebody that is not an environmental group.

Mr. BERNHARDT. Well, actually, the ESA specifically provides for these fees, as well, in its text. It is there and exists under the ESA. And the so-called procedural win was a requirement that the government actually do NEPA on the biggest water project changes that had been made in the history of California.

It was quite a consequential victory to require that agencies actually think about the ramifications of their actions.

Mr. LAMALFA. Well, we will be looking into the hourly rates at which they are compensated. Instead of being 500-plus, maybe more like a standard—like 150. Thank you.

Dr. GOSAR. I thank the gentleman. The gentleman from California, Mr. Costa, is recognized for 5 minutes.

Mr. COSTA. Thank you very much, Mr. Chairman, Ranking Member. I apologize for having missed the earlier testimony and comments from my colleagues, but this is an issue that, in terms of its broader application and scope, has troubled me because I think that the Endangered Species Act is an important law in our Nation. But I think that, frankly, there are challenges that we see today in terms of its application. When you couple in climate change and other factors, I question how we best provide its implementation in various circumstances.

Mr. Ashe, the Administration has been moving forward on implementation of the ESA on its ability to make a difference. Regulations that are promulgated, as has been discussed, have had devastating overlying impacts on water allocation in California, and that is where I am going to confine my comments to. We have had a zero water allocation last year, a zero allocation the year before, and a 5 percent allocation this year.

I believe that the numbers are pretty accurate that, as of January 1 of this year, if we had used the flexibility under the existing law—and I think the biological opinions are flawed—that at least 240,000 acre-feet could have been moved through the Delta. Obviously, that water is gone. *The Sacramento Bee*—and I would like to enter it into the record—on Sunday indicated, I think, a good descriptive on this.

Director Ashe, is this the best that can be done in implementing the Endangered Species Act and still allow for the protection and the movement of water in California?

Mr. ASHE. Is it the best that can be done? I believe, Congressman, our people are doing the best that they can do, and——

Mr. COSTA. Let me ask you the question this way. Has the Fish and Wildlife Service taken the time to create a long-term recovery plan for the Delta smelt?

Mr. ASHE. We do not have a recovery plan for the Delta smelt.

Mr. COSTA. So you are trying to use the law to protect the species by using one management tool in your toolbox, which is simply the flows of water, and you do not have a recovery plan.

Mr. ASHE. I would say what we are trying to do is trying to help the project operate. The project has an obligation——

Mr. COSTA. Well, that is subject to definition.

Mr. ASHE. I will admit——

Mr. COSTA. I do not want to belabor that point. Do you think the Endangered Species Act can be reformed to achieve better outcomes for species recovery in light of climate change, as it relates to minimizing the impact on human populations? Because I want to tell you something. Those zero water allocations have devastated the communities I represent, with thousands and thousands of farm workers being unemployed, the impact to the farm communities and to the farmers, and lost income, and potentially, lost farms, and people that have had to move away because there are no longer jobs available.

Mr. ASHE. Well, as you know, Mr. Costa, I respect and admire your ferocity in representing your constituents on this issue——

Mr. COSTA. I appreciate that. But my question is, can we get better outcomes? Do you think we should look at——

Mr. ASHE. We can get better outcomes if we have more resources to implement the law.

Mr. COSTA. Why don't we have a species recovery plan?

Mr. ASHE. Because we lack the resources to——

Mr. COSTA. There was $50 million in drought funding for California, alone. It seems to me that a priority ought to be to deal with a species recovery plan that would not rely solely on the use of water.

Mr. Bernhardt, this is an issue that you are very familiar with. Do you think we could modify the Endangered Species Act in a way that would make species recovery better?

Mr. BERNHARDT. I think certainly the law can be modified. And I think the challenge of climate change creates new challenges for the administration of the Act.

Mr. COSTA. Why don't you think there is a recovery plan?

Mr. BERNHARDT. Why do I not? I think that, at the end of the day, the Service focuses on its priorities, whatever those may be, with the resources it has.

Mr. COSTA. But if their priority is recovering the species, it seems to me having a plan to recovery would be kind of the first order of business.

Mr. BERNHARDT. It is my experience, sir, that agencies focus their resources on their priorities.

Mr. COSTA. What you are saying, then, in your opinion, this is not a priority of the agency.

Mr. ASHE. Our priority has been on consultation——

Dr. GOSAR. I thank the gentleman. The gentleman from Washington is acknowledged.

Mr. COSTA. I think I have made my point.

Dr. GOSAR. I think you did. The gentleman from——

Mr. NEWHOUSE. Thank you, Mr. Chairman, Mr. Ranking Member. I appreciate all the panelists being here today. Your time is very valuable, and we appreciate your input.

Director Ashe, I am particularly interested in your testimony, and appreciate your comments very much. I wanted to point out that on April 1 your agency released a report that found that the gray wolf populations are actually doing quite well. They are increasing in the Northwest.

Mr. ASHE. They are.

Mr. NEWHOUSE. They have stabilized. According to your press release—and I will quote that—"The wolf population has exceeded recovery goals identified by the Service and partner biologists since 2002. The wolves continue to expand their range westward in Oregon and Washington. An additional 200 wolves and 34 packs, including 19 breeding pairs, were estimated in those two states." Additionally, the report states that the total wolf population in the Pacific Northwest and Montana, Idaho, and Wyoming now is estimated to be 1,904 wolves.

So, it seems to me like we should call success when we see it. Given your comments about this Administration delisting more species than all other administrations combined, why isn't the Service moving forward with finalizing and implementing their 2013 proposed delisting rule for the wolf?

Mr. ASHE. The wolf is probably one of the most frustrating issues during my tenure as director. Wolves are recovered in the Northern Rocky Mountains, and as I said before the House Appropriations Committee, we are kind of like that truck that is in the mud up to the running boards, you know? We can't go forward, we can't go backward.

And so, right now, we proposed a rule to delist wolves nationwide, except for the Mexican wolf in the southwestern United States. That proposal was criticized roundly; we put it out for peer review, and we got significant scientific criticism of the proposal.

Wolf taxonomy is Byzantine at best, I would say. We are in a position where it is very difficult for us to move forward or backward on wolf. And, right now I have much higher priorities, quite frankly, in terms of our delisting agenda. That is unfortunate for states like Washington and Oregon that have very good wolf management programs. We continue to see the geography and the numbers of wolves expand, and we are trying to provide all the flexibility that we can to those states to manage within the context of an endangered listing for wolves.

Mr. NEWHOUSE. Now, as you know, our State Department of Fish and Wildlife supports delisting.

Mr. ASHE. They do.

Mr. NEWHOUSE. I will look forward to continuing to work with you to achieve your stated goal.

Mr. ASHE. And I would like to come talk to you about that, specifically.

Mr. NEWHOUSE. Absolutely. Let's move on to another species. Could you explain to me the reasoning behind the decision to reintroduce grizzly into the North Cascades? What scientific evidence led to that decision? And where does that process currently stand?

I can tell you that I have heard from many concerned constituents about this proposal. So, maybe you could discuss some of the public feedback that you have gotten, as well, and some of the common themes that you are hearing.

Mr. ASHE. So what we have done is, along with the Park Service and the state of Washington, we have begun a scoping process. We have not made a decision to re-introduce grizzly bear, we just made a decision to consider that possibility. And it was principally the interest of the National Park Service to begin that process. So we worked with them, along with the state of Washington, to design

that scoping process and to hear the concerns that the public might have.

Mr. NEWHOUSE. What are some of those concerns. Could you share?

Mr. ASHE. I have not seen the record directly myself at this point, Mr. Newhouse. I would imagine I could predict some of the concerns about predation, about personal safety associated with grizzly bear. But at the same time, grizzly bears can be an important part of a recreational economy, as well. We see certainly in the greater Yellowstone ecosystem grizzly bears are a very vibrant part of a recreational economy and essential to the vitality of that area.

Mr. NEWHOUSE. Well, again, I look forward to working with you and having further conversation. With that, my time has just about expired.

Thank you, Mr. Chairman, and again, I appreciate all of you being here.

Dr. GOSAR. I thank the gentleman. The gentleman from Georgia, Mr. Hice, is recognized for 5 minutes.

Dr. HICE. Thank you, Mr. Chairman. I appreciate calling this committee hearing on critical habitat; and each of our panelists, I thank you for your testimony here today.

Director Ashe, you are on a roll, so we will try to keep you going here for a couple more questions. Under these rules, will the Services need to make a distinction between occupied and unoccupied habitat and designating the critical habitat?

Mr. ASHE. We would make a distinction. At the time we designate habitat, if habitat is unoccupied, we would be identifying that as currently unoccupied habitat, and we would be justifying our reason for designating critical habitat.

Dr. HICE. Well, how will they need to make the distinction?

Mr. ASHE. So what we would do is, if the habitat is currently unoccupied, we would make the case for why that habitat is important to the potential recovery of the species.

So again, we would have to build an administrative record to support that designation in the light of, certainly, substantial interests being expressed against designating that critical habitat. So, the process of designating critical habitat is a public process where we get much input from the state and from interested public and private parties.

Dr. HICE. Correct me if I am wrong, but it seems that it would be much easier to designate an unoccupied area than occupied. And to me, this goes against common sense. But it seems that designating unoccupied areas would be easier because, obviously, the occupied area requires having certain biological and physical features and all that sort of stuff, whereas the unoccupied area would not.

Mr. ASHE. I would think I would take the opposite posture. I think it is much easier for us to document a case for critical habitat if it is occupied, the species is there, we can demonstrate that the habitat is there, because the species are there.

If we are going to make a case for designating unoccupied habitat, I would say the burden is higher on us to show why, because the species is not there, or because maybe some of the critical biological or physical features are not there currently, that we would have a higher obligation in that case.

Dr. HICE. Mr. Bernhardt, do you have anything to add to that?

Mr. BERNHARDT. Yes, I do, because I think Mr. Ashe just explained the converse of what his new rule does. His new rule specifically does not require that physical biological features be present in unoccupied habitat, but it does in occupied areas.

A very significant change of this rule is that, up to this point, they did not look at designating unoccupied habitat until they made a determination that the occupied habitat was not sufficient for the conservation of the species.

They don't have to do that, and they don't have to look for the features that are necessary for conservation. They just have to say, "In our mind, this area is essential for the conservation of the species because," even if the physical and biological features are not present.

Dr. HICE. OK. Thank you.

Ms. Budd-Falen, do you have anything further to add?

Ms. BUDD-FALEN. No, I absolutely agree with Mr. Bernhardt. And I think that, actually, it is going to make litigation much harder, because under the arbitrary and capricious standard of the APA, the Fish and Wildlife Service only has to come up with some sort of scenario where they are correct, and we cannot win that. It is much different and going to be much harder for us to challenge these critical habitat designations, because they only have to show up with something that says, "Some day in the future this is going to have the features," and there is no way for us to argue that.

Dr. HICE. I would agree with you.

Director Ashe, back to you. It is easy to view rules and regulations in a vacuum. I think sometimes we do this. But these rules are piled up on top of hundreds of other rules and regulations. Have you analyzed the cost impacts of increased consultations because of expanding Federal jurisdiction in other areas, such as the EPA's expansion of the Waters of the U.S.?

Mr. ASHE. I have no context within which I can do that, no. When we——

Dr. HICE. Well, that seems like a rather important thing. Why have you not taken time to do this, since there is a pretty big impact on the Federal budget?

Mr. ASHE. What you are asking me to do is analyze the impact of my rule in the context of all rules that EPA or the Securities Exchange Commission, or any——

Dr. HICE. Don't you think it is important for someone to?

Mr. ASHE. I don't know, but it is impossible for me to do, especially given the resources that I have to implement the law. What my responsibility to do is to analyze the consequences of my action; and we do that with the Office of Management and Budget as we move a rule forward, to look at the additional costs of consultation and burdens that our regulation may impose.

Dr. HICE. Thank you.

Dr. GOSAR. I thank the gentleman. The gentleman from Arizona, Mr. Grijalva, is acknowledged for 5 minutes.

Mr. GRIJALVA. Thank you, Mr. Chairman.

Dr. Mehrhoff, ESA opponents claim that Fish and Wildlife is not delisting species fast enough. However, threatened and endangered

species, as has been said before by Mr. Ashe and others, must recover before they are delisted.

How does the designation of critical habitat promote that species recovery? Doctor?

Dr. MEHRHOFF. Thank you for the question. Critical habitat is a pretty important aspect of the recovery process, particularly for species that are already at extremely low numbers, because you have a very large increase in population that is going to be needed before those species can reach recovery. So you need to make sure that you have habitat for them to grow into as they recover.

It also, as we have mentioned several times today, really helps focus conservation actions in specific high-priority areas, and kind of gets us to the end game quicker by everybody working together, like what happened with Channel Island foxes, a slightly different situation, but that is kind of the idea.

Mr. GRIJALVA. OK. In your opinion again, Doctor, does the Fish and Wildlife Service get the financial resources and the political backing it needs from Congress in order to achieve a shared goal, which is to be able to recover and delist species as quickly as Congress would like to see it?

Dr. MEHRHOFF. No. When there is money that comes in, particularly on a species like Channel Island fox, and everybody is working together, you can see how quickly things can move.

But I can tell you from personal experience working on a lot of very rare species that do not get very much money, that there is never enough money in some parts of the United States in the Fish and Wildlife Service—not necessarily all, but in some, where, when I was in that decisionmaking process, I did not fund projects that were close to getting a species off the list, because my higher priority was to keep other species from going extinct in the next 2 years. So, by not having enough money to do both of those, we delayed recovery without question.

Mr. GRIJALVA. The other point that came up as a mitigating factor in both habitat designation and recovery is the issue of climate change.

Dr. MEHRHOFF. Correct.

Mr. GRIJALVA. I appreciate the acknowledgment by all the witnesses that that is a factor, despite the lack of acknowledgment by the U.S. Congress.

But nevertheless, climate change, as a mitigating factor, critical habitat as part of that recovery process. Doctor, do you see a "because of one we should not do the other" kind of a——

Dr. MEHRHOFF. Well, no. I think you are going to have to factor critical habitat into the climate change scenario to look at what will be needed into the future. But again, this is not a fly-by-night operation. There is a lot of science that needs to go into that to decide that these areas are the ones that are needed above and beyond currently occupied habitat to take into account the needs of climate change.

So, it is a very intense process, heavy science, heavy lifting by a lot of people in order to figure out what is the——

Mr. GRIJALVA. One does not negate the other in terms of——

Dr. MEHRHOFF. Absolutely not.

Mr. GRIJALVA. OK.

Dr. MEHRHOFF. You have to have both.

Mr. GRIJALVA. I was hoping that was not the choice we were being confronted with.

Again, one more point, Doctor, Ms. Budd-Falen lamented the fact that the issuance of Federal flood insurance and Federal agriculture assistance triggers consultation under ESA. Do you share that concern?

Dr. MEHRHOFF. I don't see it as a concern. I see it as proper functioning of a government. In other words, as we mentioned before, the ESA kind of tries to make sure that one hand isn't doing something that the other hand doesn't know about by working together under the consultation process. This is an important feature to keep one agency from inadvertently causing the extinction of another species.

So, it is an important role for the ESA to play, but it usually does not stop projects, it means they have to be jiggled around——

Mr. GRIJALVA. Yes. So if a landowner does not want to be bothered with this, they do not accept the government assistance, correct?

Dr. MEHRHOFF. Correct.

Mr. GRIJALVA. With that, thank you, Mr. Chairman. I yield back.

Dr. GOSAR. I thank the gentleman. Can I get Slide 1 placed up there?

[Slide]

Dr. GOSAR. Director Ashe, you know, it is you on the hot spot.

Here is a map that was released last week by the Service announcing that the agency is pursuing a draft compatibility determination to impose new boating restrictions within the Havasu National Wildlife Refuge. Essentially, the Service is seeking to prohibit waterskiing, wakeboarding, and other recreational towed devices in all the purple and teal areas with the dots. Is that correct, Director Ashe?

Mr. ASHE. I am not familiar with the substance. I will assume that it is.

Dr. GOSAR. It is. So, in total, how many miles or acres would be closed to these activities under this compatibility determination?

Mr. ASHE. I have no idea.

Dr. GOSAR. Would that include all the purple dots within the 4,000-acre Topock Marsh, where you are all seeking to implement the no-wake speeds?

Mr. ASHE. I do not know.

Dr. GOSAR. You do realize this is a man-made impoundment, do you not?

Mr. ASHE. I do realize that.

Dr. GOSAR. OK. I have heard all these wonderful things about your Service, but this is going to kind of be a black eye.

Last May, the Service established new boating restrictions and closed motorized boating in a half-mile backwater area that had been utilized by recreational enthusiasts for decades. This order was effective immediately and implemented by the acting refuge director without public comment.

Shamefully, this arbitrary closure became effective 2 days before the Memorial Day weekend, a very important tourist weekend for Lake Havasu.

Could staff bring up Slide 2?

[Slide]

Dr. GOSAR. Do you know who this is, Mr. Ashe?

Mr. ASHE. I do not.

Dr. GOSAR. This is 10-year-old Ryder Bliss. Ryder is a special needs child who learned to wakeboard in the backwaters of Lake Havasu that your agency shut down last May. Ryder no longer has a safe place to wakeboard in Lake Havasu, as you expect him to go out in the open waters, where boats are traveling at 70 miles per hour.

Slide 3.

[Slide]

Dr. GOSAR. This slide contains an email from the acting refuge manager stating that a paddle boater's request to immediately extend the half-mile no wake zone was not feasible, and would require public comment.

Slide 4.

[Slide]

Dr. GOSAR. This slide contains another email from the acting refuge manager on November 26, 2014, stating she will be putting out a proposal for a 30- to 60-day public comment period.

Slide 5.

[Slide]

Dr. GOSAR. This slide contains another email from the acting refuge manager from January 9, 2015 stating she is still working on a proposal for public comment.

Slide 6.

[Slide]

Dr. GOSAR. This slide contains an email from acting refuge manager stating that this half-mile closure would likely meet resistance and require NEPA compliance.

Did your agency follow NEPA before implementing the May 2015 closure?

Mr. ASHE. [No response.]

Dr. GOSAR. The answer is no. I don't want you to misrepresent it, so the answer is no. Your agency did not comply with NEPA prior to implementing the May 2015 restriction.

Shamefully, in the draft compatibility determination released last week, your agency stated, "Due to the absence of controversy, the Service utilized a NEPA categorical exclusion and did not solicit public comment prior to the May 2015 closure." There was considerable controversy, and your agency knew it. There should have been a public comment period.

Furthermore, this closure was arbitrary, and not warranted. In fact, on a March 31 conference call, your staff indicated that there had been about 12 citations since 2012 in the area you closed last May. That is around three per year. Your staff also indicated the number could be higher, but that you all don't know, because your agency and local law enforcement does not document the actual locations of boating citations. If you don't know how many incidents actually occurred in these areas, how are you going around arbitrarily closing these boating areas and citing safety concerns?

Your staff also admitted on March 31 that you all had no data or environmental studies that documented any washouts of threat-

ened or endangered species nests prior to making this arbitrary decision. In fact, when asked if wakes had harmed wildlife in this area, staff stated, "I assume the answer is yes." Hmm, that is really scientific. No evidence actually existed prior to implementing this arbitrary closure.

Your staff also indicated that your agency was holding a 30-day public comment period in public meeting on a new compatibility determination because you heard my concerns. I don't think you heard my concerns, so let's be clear: Stop arbitrarily trying to close motorized boating areas in Lake Havasu. Your shameful proposals are not based on science nor merit.

Further, holding a public meeting on a Tuesday, when people working from Arizona cannot attend, just does not cut it. I am going to continue to keep this open.

I have one last question. Director Ashe, last year you testified during a joint subcommittee hearing that the warm water discharges from the Big Ben Power Plant in Florida are "having a direct and substantial impact on the manatee." That power plant is actually a warm water refuge for manatees that help them survive cold water temperatures during the winter.

In January of this year, the Fish and Wildlife Service proposed to downlist the manatee from endangered to threatened status under the ESA. Meanwhile, the EPA is defending its clean power regulations, which will most likely shut down Big Ben and other power plants that manatees rely on.

Director Ashe, will you assure the committee today that the Fish and Wildlife Service will not issue any 4(d) rules that allow the take of manatees at warm water refuges directly or indirectly affected by the EPA's regulations?

Mr. ASHE. I am not going to make any statement about what the Fish and Wildlife Service might do under Section 4(d) without more context to that. We have no intention of publishing a 4(d) rule at this point in time with regard to manatee, to my knowledge.

Dr. GOSAR. Well, given the circumstances, we would like a full synopsis, based on that question, for the record.

So, with that, this hearing is adjourned, and I thank all the witnesses for coming today. Thank you.

[Whereupon, at 12:30 p.m., the committee was adjourned.]

[LIST OF DOCUMENTS SUBMITTED FOR THE RECORD RETAINED IN THE COMMITTEE'S OFFICIAL FILES]

—PowerPoint slides used in the hearing by Rep. Paul A. Gosar

—*The Sacramento Bee*—Editorial: Delta pumping to Southern California restricted despite rainy winter (2016)

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